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Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME IV, PAGES 795 TO 1063

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IN THE TEXAS COURT OF CRIMINAL APPEALS
AND THE 258TH JUDICIAL DISTRICT
OF POLK COUNTY, TEXAS

EX PARTE	§	Court of Criminal Appeals
JOHNNY PAUL PENRY	§	Cause No. 71,130
	§	258th District Cause No. 10,222
	§	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having reviewed the Applicant's Petition for a Post-Conviction Writ of Habeas Corpus (including the attached exhibits and affidavits); the State's Answer (including the attached exhibits and affidavits); the statement of facts from the motions hearing held on June 18, 1997, the statement of facts from the evidentiary hearing held on July 3, 1997, the transcript of the oral deposition of Santiago Caberto, M.D., the official court records and relying on personal recollection, the Court makes the following finding of fact and conclusions of law:

FINDINGS OF FACT

F1. On November 7, 1979, Applicant, Johnny Paul Penry, was charged by an indictment filed in the 258th Judicial District Court of Polk County, Texas, with the capital offense of intentional murder of Pamela Carpenter during the course of committing an aggravated rape. 1 TR 1.

F2. Venue was transferred to Trinity County where he was convicted of capital murder and sentenced to death.

F3. Applicant's conviction and sentence were affirmed on direct appeal. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied sub nom. Penry v. Texas*, 474 U.S. 1073 (1986).

F4. On federal habeas review, however, the Supreme Court ultimately held that Applicant's eighth and fourteenth amendment rights were violated at the punishment phase of his trial. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

F5. Following remand, Applicant was retried in state court. Venue was transferred to Walker County, and Applicant was tried before a jury upon a plea of not guilty.

F6. Prior to retrial, Applicant was housed on death row at the Ellis I Unit of the Texas Department of Criminal Justice.

F7. On July 9, 1990, the jury found Applicant guilty of the capital offense. 4 TR 1005.

F8. A separate punishment hearing ensued and, on July 17, 1990, the jury answered affirmatively the three special issues submitted pursuant to former article 37.071(b) of the Texas Code of Criminal Procedure. 5 TR 1331-32.

F9. In accordance with law, the trial court assessed punishment at death.

F10. Appeal was automatic to the Court of Criminal Appeals, which affirmed the conviction and sentence in an opinion delivered February 22, 1995, and denied rehearing on June 7, 1995. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995).

F11. The Supreme Court denied Applicant's petition for writ of certiorari on November 13, 1995. *Penry v. Texas*, 116 S. Ct. 480 (1995).

F12. The Supreme Court denied Applicant's motion for rehearing on January 8, 1996.

F13. Following Applicant's request for appointed counsel to pursue state habeas relief, the Court of Criminal Appeals appointed John E. Wright on July 25, 1996, pursuant to article 11.071 of the Texas Code of Criminal Procedure.

F14. Pursuant to Article 11.071, § 4(a), Applicant's brief was due on October 20, 1996. Pursuant to an order of the Court of Criminal Appeals entered October 9, 1996, Applicant filed an incomplete application for writ of habeas corpus with the district court on October 17, 1996.

F15. Thereafter, Applicant sought and was granted an extension to file his complete application until April 20, 1997.

F16. On April 21, 1997[1] Applicant filed his complete "Petition for a Post-Conviction Writ of Habeas Corpus" asserting nine separate claims for relief.

F17. On May 21, 1997 the State filed the "Answer of the State of Texas to Applicant Johnny Paul Penry's Petition for a Post-Conviction Writ of Habeas Corpus."

F18. Pursuant to Section 9 of Art. 11.071 of the Texas Code of Criminal Procedure, the District Court scheduled an evidentiary hearing for July 3, 1997 to address the

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[1] April 20, 1997 was a Sunday.

claims asserted by Applicant in Count I of his timely application.

F19. After the State filed its answer to Applicant's original petition, on May 30, 1997 Applicant filed a "Supplement to Count I of Applicant Johnny Paul Penry's Petition for a Post-Conviction Writ of Habeas Corpus."

F20. On June 10, 1997 Applicant filed a "Motion for Leave to File and Present Evidence in Support of His Supplement to Count I of His Application for a Writ of Habeas Corpus."

F21. The State opposed Applicant's motion and proposed supplement to Count I as untimely.

F22. The Court scheduled a hearing on Applicant's motion for June 18, 1997 at which time testimony was heard by the Court regarding the timeliness of Applicant's Supplement to Count I of his application.

F23. Following the hearing, the Court ruled that although Applicant's position appeared to have changed, the issues presented in Applicant's Supplement were so closely related to the issues presented in the original petition that evidence covering all of the issues could be presented at the July 3, 1997 hearing. Motions Hearing Transcript at pp. 60-61.

F24. Pursuant to Section 9(a) of Article 11.071, the Court permitted the parties to propound interrogatories in preparation for the July 3, 1997 hearing.

F25. On July 3, 1997, pursuant to Article 11.071, Section 9 the Court conducted an evidentiary hearing on the allegations raised in Count I of Applicant's original and supplemental applications.

F26. Prior to the July 3, 1997 evidentiary hearing, Counsel for Applicant sought an abatement of the proceedings on the basis of a claim that Applicant is incompetent to participate in the habeas proceedings.

F27. Applicant has twice been found competent to stand trial, most recently in 1990.

F28. Applicant is no longer receiving any psychiatric medication. EHSOF Vol. 1, p. 146.

Cl. Applicant's alleged incompetency failed to state a basis for abating the habeas proceedings. Applicant does not identify any authority requiring that an applicant be competent to assist in his habeas proceeding.

C2. In the alternative (to C1), Applicant has failed to alleged sufficient facts to call into question his competency, particularly in light of the two prior adjudications of competency. *See and compare Ford v. Wainwright*, 477 U.S. 399, 417 (1986) (Marshall, J., writing for the plurality) ("It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of [incompetency for execution]."); Id. At 426 (Powell, J., concurring) (if defendant previously adjudged competent to stand trial, "[t]he State . . . may properly presume that [the] petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process.").

F29. On July 3, 1997, the Court conducted an evidentiary hearing on the allegations of Count I of Applicant's original and supplemental allegation.

I.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT I OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

A.

PRELIMINARY FACTUAL FINDINGS AS TO COUNT I

F30. At the July 3, 1997 evidentiary hearing, the Court considered the following issues presented in Count I of Applicant's petition:

A. Whether the State failed to disclose a change to Applicant's psychiatric medication prescription prior to his competency trial in violation of *Brady v. Maryland;*

B. Whether the State failed to disclose changes to the timing of the administration of Applicant's psychiatric medication during the guilt/innocence trial in violation of *Brady v. Maryland;*

C. Whether the State violated *Giglio v. United States* by allowing a witness to give false testimony;

D. Whether changes, if any, to Applicant's psychiatric medication constituted a violation of Applicant's rights under *Riggins v. Nevada,* 112 S.Ct. 1810 (1992).

F31. Throughout the latter 1980's and early 1990, Applicant was prescribed various psychiatric medications. EHSOF Vol. 2 p. 216. The fact that Applicant's trial counsel were aware that their client was prescribed psychiatric medication at the time of the 1990 court proceedings is not in dispute. Motions Hearing Transcript p. 42.

F32. Applicant was primarily treated with anti-depressants. EHSOF Vol. 2 p 216.

F33. On March 23, 1989, Applicant's prescription was changed to discontinue Mellaril and change to Triavil 2-25, to be given orally, one tablet at noon and the other at the hour of sleep. State's Exhibit 1 at page 223.

F34. Triavil is a commercial formulation of two drugs, amitriptyline, which is an anti-depressant, and perphenazine, which is an anti-psychotic. EHSOF Vol. 1 p. 117. Triavil 2-25 contains 2mg of perphenazine and 25mg of amitriptyline. Affidavit of Jonathon J. Lipman, Exhibit "A" to Applicant's Application.

F35. Throughout 1989, Applicant's Texas Department of Criminal Justice (TDCJ) mental health records indicate that his medical and mental diagnosis included mild mental retardation with behavioral symptoms, anti-social personality disorder and hypoglycemia. State's Exhibit 1 pp. 239-50.

F36. On April 6, 1989 Applicant's Triavil prescription was changed to require one Triavil 4-50 at noon and one Triavil 4-25 at the hour of sleep. State's Exhibit 1 p. 222.

F37. The April 6, 1989 prescription was continued throughout the remainder of 1989. State's Exhibit 1 p. 214-20.

F38. The TDCJ medical records indicate that Applicant was examined by a TDCJ psychiatrist on February 5, 1990 and the Applicant's Triavil prescription was modified to require a Triavil 2-25 in the a.m. and a Triavil 2-25 in the p.m.. This chart entry reflects that while Applicant

was given Elavil previously he had been paranoid and was "hearing voices." The chart entry further reflects that on February 5, 1990, Applicant reported that he was "doing fine and is not having any problems except for worrying about his case." State's Exhibit 1 p. 213.

F39. On March 5, 1990, the TDCJ records reflect that Applicant was again examined by a psychiatrist. The chart entry reflects that Applicant reported that he had been "eating okay" but had been "worrying about his case so doesn't sleep as well." Applicant felt that his "meds" were too strong and reported that he had refused his "meds" from one nurse because they were on bad terms. The chart entry reflects that Applicant was concerned about his safety at court and was also concerned that the victim's family might have a plot on his life. The Triavil prescription was adjusted to include a Triavil 2-10 in the a.m. and a Triavil 2-25 in the p.m. State's Exhibit 1 p. 211.

F40. On April 2, 1990 Applicant was again examined by a TDCJ psychiatrist and his Triavil prescription was modified. It is this change to Applicant's medication that Applicant asserts as his principal claim. On April 2, 1990 the chart entry reflects that Applicant reported feeling a "little paranoid" and was concerned that "the officers may try to hurt him when they take him to court." Applicant was concerned that the officers were talking about him. He reported that he was eating okay but was not sleeping well. He reported that he was happy his case had been moved to Huntsville. His Triavil prescription was changed to include a Triavil 4-50 and a Triavil 2-10 to be given together p.m. He was also prescribed Cogentin 1mg twice daily as needed. State's Exhibit 1 p. 209-10.

F41. On April 23, 1990, three weeks following the April 2, 1990 prescription change, the TDCJ medical records reflect that Applicant reported that he had hurt his ankle while playing basketball. State's Exhibit 1 p. 208.

F42. The April 2, 1990 Triavil prescription was continued on April 26, 1990 and the Cogentin was prescribed twice daily. State's Exhibit 1 p. 208.

F43. Pat Piatkowski, an Ellis I Unit psychiatric nurse, visited Applicant on April 25, 1990. State's Exhibit 1 p. 260. During that visit, Applicant denied experiencing any symptoms or side effects – including "EPS" or extra-parametal side effects – associated with his psychiatric medication. State's Exhibit 1 p. 260.

F44. Piatkowski testified that as a psychiatric nurse she was personally concerned about the possibility that inmates taking psychiatric medications might be experiencing side effects from the medication.

F45. On April 25, 1990, Piatkowski determined that Applicant was not experiencing side effects from his medication. EHSOF Vol. 2 p. 259.

F46. On April 26, 1990 Applicant was seen by T.D.C.J. psychiatrist Santiago Caberto. During the visit, Applicant spoke with Dr. Caberto concerning his upcoming trial and the possibility of a change of venue. Applicant expressed to Dr. Caberto that he was concerned about being transferred to the Walker County Jail. Applicant told Dr. Caberto that he took his medication and needed it to relax. At the time of the visit, Dr. Caberto described Applicant as alert and oriented times three

which Dr. Caberto explained meant that Applicant was oriented as to time and place. Dr. Caberto explained that he would not have described a person as alert and oriented if the person was experiencing significant depression or psychosis. Deposition of Santiago Caberto, M.D. p. 53-54.

F47. Applicant's competency trial commenced with jury selection on Monday, May 7, 1990.

F48. Throughout Applicant's court proceedings in 1990 Applicant remained housed at the Ellis I Unit of the Texas Department of Criminal Justice which is in Walker County, Texas, the location of Applicant's trial. Applicant's trial counsel never objected to Applicant remaining at the Ellis I Unit throughout the court proceedings. Motions Hearing Transcript p. 41-42.

F49. Prior to commencement of the competency trial, Applicant was examined for competency during the latter part of April by the State's psychologist Dr. Walter Quijano. Applicant was subject to the April 2, 1990 Triavil prescription at the time of Dr. Quijano's interview. During his competency trial testimony, Dr. Quijano pronounced Applicant competent to stand trial. Dr. Quijano did not mention in his trial testimony any problems that he observed regarding Applicant's Triavil prescription. 90SOF[2] Vol. 12 p. 921-26.

F50. Applicant was also examined by the Defense psychologist Dr. Randall Price on April 20, 1990, May 8,

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[2] 90SOF refers to the Statement of Facts from the 1990 court proceedings.

1990(the Tuesday following jury selection in the competency trial) and June 13, 1990. Although Dr. Price was of the opinion that Applicant was incompetent, the Court finds it noteworthy that Dr. Price testified that during his visits with Applicant he found no evidence of mental disorder other than mental retardation. Dr. Price specifically testified that he found no evidence of psychosis. Presumably, Dr. Price, having obtained Applicant's history, was aware that Applicant was being administered Triavil. Dr. Price in his trial testimony did not mention any observation of possible problems that Applicant was experiencing with his psychiatric medications. 90 SOF Vol. 48 pp. 1310-11 & Vol. 49 1439-45.

F51. Applicant was also examined by Dr. Fred Fason, a psychiatrist testifying for the State, during the last week of April and on May 4, 1990. Dr. Fason specifically testified at trial that he was aware that Applicant was being administered Triavil. Dr. Fason testified that Applicant was competent to stand trial and stated that during his visits with Applicant he could detect no signs of mental illness or psychosis. Fason testified that during his visits with Applicant, Applicant had no problems communicating.90SOF Vol. 12 p. 981-85, 1000. Importantly, Fason did not testify as to observing any problems with Applicant that might have been associated with the Triavil prescription.

F52. On Wednesday, May 9, 1990 Applicant was transported to The University of Texas Medical Branch in Galveston for an EEG. During the EEG test, Applicant was described as alert and cooperative.

F53. On May 7, 1990, during the jury selection for the competency trial, Applicant's attorney John Wright questioned a juror about Cogentin, which as noted above, was first prescribed to Applicant on April 2, 1990. 90SOF Vol. 8 p. 194.

F54. Dr. George Mount, a psychologist, testified for the defense during the competency trial on May 14, 1990. Dr. Mount testified that he had been previously provided Applicant's medical records from T.D.C. When questioned if he was aware that Applicant had been prescribed psychotropic medications, Mount testified that he was aware that Applicant had been prescribed Triavil, Cogentin and Elavil. 90SOF Vol. 11 pp. 699, 700, 757.

F55. During the competency trial the defense had marked for identification purposes, Applicant's TDCJ medical records which included the April 2, 1990 prescription which now forms the principal basis of Applicant's habeas claim. State's Evidentiary Hearing Exhibits 4-A, 4-B and 4-C (formerly Defense Competency Trial Exhibits 6-A, 6-B and 6-C for identification).

F56. The competency trial concluded on Wednesday, May 16, 1990 with the jury finding that applicant was competent to stand trial.[3] 90SOF Vol. 8 p. 1076.

F57. TDCJ Medication Compliance records produced in habeas discovery are silent as to whether Applicant was administered Triavil on May 7, 8, 9, 10, 11, 12, 14 and 16, 1990. The records do reflect that Applicant was administered Triavil on May 13 and 17, 1990 as well as

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[3] Applicant had also been found competent to stand trial prior to this first trial in 1980.

other days throughout the month of May except as otherwise noted. The same TDCJ Medication records reflect that Applicant was administered Cogentin on May 8, 9 and 16. The records indicate that Applicant refused Cogentin on May 6, 7, 8, 10, and 13, 1990. State's Answer Exhibit "G ."

F58. Applicant was in Court for competency trial proceedings on May 7, 10, 11, 14, 15 and 16. As previously noted, Applicant was examined by Dr. Price on May 8, 1990 and was transported to UTMB Galveston on May 9, 1990.

F59. At no time prior to or during the competency trial did Applicant or his trial counsel complain of or object to the administration of Triavil or other psychiatric medication to Applicant.

F60. At no time prior to or during the competency trial did Applicant's trial counsel ever advise the court of any physical or mental problems that Applicant might have been experiencing which might have been occasioned by the administration of Triavil to Applicant.

F61. Applicant's TDCJ medical records contain numerous instances of Applicant requesting or refusing various medications or medical services from the TDCJ medical staff. However, Applicant's TDCJ medical records do not reflect that Applicant complained of not receiving, or that he otherwise requested, his Triavil medication at any time during the competency trial in May of 1990.

F62. Applicant's trial counsel never complained to the court of Applicant not receiving his Triavil medication during the May 1990 competency trial.

F63. On May 22, 1990 Applicant was seen by psychiatric nurse Pat Piatkowski who described Applicant as "cheerful" and voicing no complaints. State's Exhibit 1 p. 258.

F64. Voir Dire for the capital murder trial commenced on May 22, 1990. Individual Voir Dire continued through June 25, 1990.

F65. On June 26, 1990 Applicant was seen by psychiatric nurse Pat Piatkowski whose chart entry reflects that Applicant voiced no complaints. State's Exhibit 2 p. 17.

F66. On May 24, 1990, Applicant's prescription was continued at Triavil 4-50 and Triavil 2-10 to be administered p.m. and Cogentin 1 mg twice daily. State's Exhibit 1 p. 207.

F67. On June 26, 1990 Applicant was again observed by psychiatric nurse Pat Piatkowski and voiced no complaint at the time. State's Exhibit 2 p. 17.

F68. The evidentiary portion of the capital murder trial commenced on July 2, 1990.

F69. .On July 9, 1990 following closing arguments of counsel, the jury found Applicant guilty of capital murder.

F70. The punishment phase of the capital murder trial commenced on July 11, 1990.

F71. On July 17, 1990 the punishment phase of the trial concluded and the jury answered the special issues resulting in Applicant's death sentence.

F72. On July 11, 1990, the medical records indicate that Applicant complained to George Wheat[4], a Ellis I Unit psychologist, of "having problems coping with pressures." Applicant reported to Wheat that his trial was in the punishment stage. Wheat characterized Applicant as "alert, oriented, slightly agitated." The chart entry suggested that the Applicant's "primary concern is to get meds before he leaves for trial in a.m." State's Exhibit 2 p. 16-17.

F73. On July 11, 1990 the only medication that Applicant was prescribed to take in the "a.m." was Cogentin. There is no evidence that Applicant was ever administered anything other than Cogentin before court in the "a.m." EHSOF Vol. 1 p. 174.

F74. In September of 1990, following Applicant's capital murder trial, Applicant requested that his Triavil prescription be discontinued. State's Exhibit 2 p. 8.

F75. Dr. Caberto discontinued Applicant's Triavil and Cogentin prescriptions on October 8, 1990. State's Exhibit 2 p. 8.

F76. On October 19, 1990, Applicant filed a sick call request requesting that his medications be renewed. State's Exhibit 2 p. 8.

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[4] Wheat testified on Applicant's behalf during the competency trial.

F77. Dr. Caberto visited Applicant on October 25, 1990. On that visit, Applicant requested that his Triavil and Cogentin prescriptions be renewed because he was having difficulty sleeping and the medications made him feel relaxed. Applicant specifically requested that Dr. Caberto renew his prescription for Triavil 4-50 and Cogentin, but not for Triavil 2-10. State's Exhibit 2 p. 12.

F78. On October 29, 1990, four days after Dr. Caberto renewed Applicant's prescription for Triavil and Cogentin, Applicant was found to be selling the drugs prescribed for him. State's Exhibit 2 p. 7.

B.

FINDINGS AND CONCLUSIONS AS TO APPLICANT'S CLAIMS THAT THE STATE FAILED TO DISCLOSE A CHANGES TO APPLICANT'S PSYCHIATRIC MEDICATION IN VIOLATION OF *BRADY V. MARYLAND*

F79. As previously noted, Applicant Assert's in Count I that the State violated *Brady v. Maryland* by failing to disclose to Applicant's counsel the change in Applicant's Triavil prescription on April 2, 1990. Applicant also complains that his prescription was changed "while his trial was underway" and that his counsel were not advised of same. In his supplemental petition Applicant also complains that the State violated *Brady* by failing to advise his trial counsel that his medication was interrupted during the competency trial.

C3. In order for Applicant to establish a right to habeas relief due to the State's failure to disclose exculpatory evidence, he must prove the following: (1) the State

suppressed or withheld evidence (2) which was favorable to the defense and (3) material to the defense. *Moore v. Illinois*, 408 U.S. 786, 92 S. Ct. 2562 (1972); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963); *Ogle v. Estelle*, 641 F.2d 1122 (5th Cir. 1981). *See also Kyles v. Whitley*, 115 S. Ct. 1555,1567 (1995).

C4. Because *Brady* only assures that an accused is not denied access to materially favorable evidence known to the government but unknown to him, no Brady violation occurs if evidence in the possession of the government could have been discovered through the exercise of reasonable diligence by the defense. *See, West v. Johnson*, 92 F.3d 1385, *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 959 (1995); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990); *Matheson v. King*, 751 F.2d 1432, 1444 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138, 106 S. Ct. 1798 (1986).

F80. Applicant and Applicant's counsel were aware of the change to Applicant's prescription on April 2, 1990.

F81. Even if Applicant's counsel was not aware of the change to Applicant's prescription on April 2, 1990, he could have been aware of same through the exercise of reasonable diligence.

C5. Because Applicant and his counsel were aware of the change to Applicant's prescription on April 2, 1990, or Applicant's counsel could have discovered the change to Applicant's prescription through the exercise of reasonable diligence, no violation of Applicant's right to due process pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) occurred. *See, West v. Johnson*, 92 F.3d 1385, *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994), *cert. denied*, 115

S. Ct. 959 (1995); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990); *Matheson v. King*, 751 F.2d 1432, 1444 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138, 106 S. Ct. 1798 (1986).

F82. Applicant also complains that the State failed to inform his trial counsel that his medical treatment was changed while the trial was underway. Specifically, Applicant claims that he was being instructed to take his medication in the morning "before going to the courthouse."

F83. There is no evidence that Applicant ever took any medication in the morning prior to leaving for the Courthouse other than Cogentin, which is reflected in the Applicant's medical records.

F84. Applicant was fully aware of the medication he was taking an was capable of informing counsel of same.

F85. Even if Applicant's counsel were not aware of the medication Applicant took in the morning prior to leaving for court, he could have been aware of same through the exercise of reasonable diligence.

C6. Because Applicant was aware and his counsel was aware of, or could have discovered, the medication Applicant was taking in the mornings prior to leaving for court, no violation of Applicant's right to due process pursuant to *Brady v. Maryland, supra*, occurred. *See, West v. Johnson*, 92 F.3d 1385, *Williams v. Scott*, 35 F.3d 159,163 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 959 (1995); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990); *Matheson v. King*, 751 F.2d 1432, 1444 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138, 106 S. Ct. 1798 (1986).

F86. Applicant also complains in his supplemental petition that his medication was interrupted during the competency trial. Applicant's claim in this regard is entirely based upon the TDCJ medication dispensing records produced during habeas discovery which contain no entries respecting the administration of Triavil for several days during the competency trial. State's Answer Exhibit "G."

F87. During the evidentiary hearing, Applicant presented no evidence, other than the aforesaid TDCJ medication dispensing records, suggesting that Applicant was not administered his psychiatric medications during the competency trial.

F88. Although Applicant was found competent to stand trial there is no evidence that Applicant ever notified his attorneys, or that his attorneys notified the Court, that Applicant was not receiving his medication.

F89. At the motions hearing held on June 18, 1997 Applicant's counsel was questioned by the attorney for the State as to whether there was evidence, other than the dispensing records, to support the proposition that Applicant was not given his medication during the competency trial. Applicant's counsel replied "That is all we have got to go on right now." Motions Hearing Statement of Facts p. 37. No additional evidence respecting this claim was presented at the July 3, 1997 evidentiary hearing.

F90. Although Applicant's TDCJ medical records reflect that Applicant requested medication and medical treatment on various occasions throughout his incarceration, there is no indication in the medical records during

the month of May, 1990 that Applicant ever requested his psychiatric medication or complained to prison authorities of not receiving his medication. State's Exhibits 1 & 2.

F91. Although the medication dispensing records are silent with respect whether or not Applicant was administered Triavil during the competency trial, the testimony of Matthew Keith, Associate Directory ofUniversity of Houston Correctional and Managed Care Health Services which provides contract pharmacy services to TDCJ, at the evidentiary hearing, indicates that it is possible that Applicant was administered Triavil on the dates in question without such administrations being electronically documented on the TDCJ computers. EHSOF Vol. 1 p. 85-86. The Court finds it likely that on the dates in question, when the death row afternoon medication rounds were made (when Applicant was customarily administered his Triavil) Applicant was out of his cell, either in court, being examined by Dr. Randall Price, or being tested at UTMB Galveston. The testimony of Applicant's witnesses Matthew Keith and Nurse Barbara Brunick indicate that there were times when the TDCJ computer would be down and the procedure for documenting the administration of medication disrupted. The Court finds that it is entirely possible that Applicant's frequent absences from his cell during the competency trial, coupled with computer difficulties, could have resulted in the administration of Applicant's Triavil not being documented. EHSOF Vol. 1 p. 92, 106-11.

92. Although the medication dispensing records may be of some relevance to the question of whether Applicant was *offered* his medication, even on the dates where the records show that Applicant was offered his

medication the records do not establish that Applicant actually *took* his medication after it was offered. EHSOF Vol. 1 p. 82-86. This is especially troubling in view of the indication in Applicant's medical records that Applicant was reported to have been selling his drugs. State's Exhibit 2 p. 7.

C7. Assuming that Applicant did not receive his Triavil prescription as prescribed during the competency trial, the State did not suppress or withhold such evidence because the State was not aware that Applicant had not received any prescribed medication.

C8. Assuming that Applicant did not receive his Triavil medication as prescribed, no violation of Applicant's right to due process of law occurred, because Applicant was aware of not having received his medication and could have informed his counsel of same. *See, West v. Johnson*, 92 F.3d 1385, *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 959 (1995); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990); *Matheson v. King*, 751 F.2d 1432, 1444 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138, 106 S. Ct. 1798 (1986).

C9. Assuming that Applicant did not receive his Triavil medication as prescribed, no violation of Applicant's right to due process of law occurred because Applicant's counsel could have discovered same through the exercise of reasonable diligence. *See, West v. Johnson*, 92 F.3d 1385, *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 959 (1995); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990); *Matheson v. King*, 751 F.2d 1432, 1444 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138, 106 S. Ct. 1798 (1986).

WHETHER THE STATE SUPPRESSED OR WITHHELD EVIDENCE

F93. Assuming that Applicant was not administered his Triavil during the competency trial as prescribed, Applicant has presented no evidence that the attorneys for the State during the 1990 trial were aware of same.

F94. Applicant further fails to demonstrate that Applicant himself could not have made his counsel aware of any problems he was experiencing relative to the administration of his medication. Applicant was found competent to stand trial and the TDCJ medical records reflect that he was capable of communicating with his medical providers regarding his medication and medical care to the point that he apparently was able to communicate to his psychiatrist what medication he thought he should be prescribed. State's Exhibit 2 p. 12 and Deposition of Santiago Caberto, M.D. at p. 81.

F95. Although Applicant seeks to impute the knowledge of the TDCJ medical providers to the State's trial counsel by characterizing them as part of the "prosecution team" Applicant fails to demonstrate that TDCJ had any interest whatsoever in the outcome of Applicant's second trial.

F96. While Applicant relies heavily upon the fact that the State called TDCJ employees as witnesses during the competency trial, the Court finds that Applicant also called TDCJ employees as witnesses at the competency trial including George Wheat, Applicant's TDCJ psychologist. 90SOF Vol. 10 p. 789.

F97. At the July 3, 1997 evidentiary hearing, Applicant called Frank Blazek ("Blazek") as a witness. Blazek was the former District Attorney of Walker County which was the location of Applicant's trial and the Ellis I Unit of TDCJ. EHSOF Vol. 1 p. 189. While Blazek testified that TDCJ and its employees were generally cooperative with prosecutors, he further testified that TDCJ considered medical records confidential and required a subpoena from the State before releasing them. EHSOF Vol. 1 p. 195-96. Blazek testified that he never recalled getting medical or psychiatric records concerning an inmate without a subpoena. EHSOF Vol. 1 p. 195-96. Blazek testified that he felt that if the defense was interested in the medical records that it was their responsibility to subpoena them. EHSOF Vol. 1 p. 196.

F98. The Court is aware of no authority which would have required the Attorneys for the State to inquire on a daily basis as to whether Applicant was being administered his medication and to advise Applicant's counsel of same. The Court finds no reason why Applicant himself could not have reported any failure to receive his medication.

C10. Assuming that Applicant was not getting his Triavil during the competency trial, the Court finds that the State did not suppress or withhold such evidence and Applicant has failed to establish this aspect of his *Brady* claim.

WHETHER THE EVIDENCE WAS FAVORABLE TO THE DEFENSE

C11. Assuming that Applicant was not receiving his Triavil and assuming his counsel were not aware of same, Applicant must establish that such evidence would have been favorable to his claim of incompetence.

F99. The Court finds that the principal basis of Applicant's claim of incompetence was based upon his claimed mental retardation.

F100. Although there was discussion during the competency trial about Applicant's psychiatric condition, same was never the principal thrust of Applicant's claim.

F101. As the Court has previously found, Applicant's counsel were obviously aware at the time of the competency trial that Applicant had been prescribed Triavil and Cogentin.

F102. To the extent that Applicant's medication was an issue during the competency trial, it was Applicant who attempted to use the fact that he was prescribed such medication as evidence of his incompetence.

F103. At the competency trial Applicant's expert psychologist, Dr. George Mount, testified as follows:

> Q. In the medical records, did you find indications of prescription type drugs?
>
> A. I saw some, indications of psychotropic medication.
>
> Q. What one?

> A. Different ones. Triavil, Cogenent (sic), Elavil, anti-depressant, anti-psychotic medication.
>
> Q. What effect would those drugs have on a person?
>
> A. Well, the purpose of them, and the reason that they are used, is to change people's behavior. The alter the brain function so they are called psychotropic. Psycho is the mind, trophic, is to return something. You are turning the mind so if a person is depressed, give him something to make him less depressed, give him something to control that, bring him back in the normality range, and that is the reason psychiatrists use those drugs.
>
> Q. Well, would those drugs ordinarily be prescribed to a person who didn't need them?
>
> A. No. You would obviously have some clear symptoms that is the reason that they are prescribed, for psychiatric disturbances.
>
> Q. Would they tend to make a person, at least appear to be more normal than they are?
>
> A. Well, that is the purpose of the drugs, is to make the person appear to function more normally, and hopefully to function in the world as opposed to an institution. That is the reason for the drug.
>
> Q. So, that if a person was given these drugs daily, while he was going to Court, in a trial like this one, might have that effect on him right here and now?

A. Sure, He would appear competent. Take the person off drugs, probably, exhibit a behavior again, activity, what have you.

90SOF Vol. 11 p. 757-59.

F104. Assuming that Applicant was not receiving his Triavil as contended, during the competency trial, in light of the foregoing testimony by Applicant's expert, it would appear that the failure to administer Triavil to Applicant would have, if anything, been *favorable* to the Applicant.

F105. The competency trial jury, having viewed Applicant in the courtroom throughout the trial, found Applicant competent. Assuming that Dr. Mount's testimony would not have changed if Applicant was, in fact, not being given Triavil, the jury's impression of Applicant would have been based upon an unmedicated Applicant, or an Applicant displaying his true demeanor, rather than the medicated, and masked, Applicant that his attorneys attempted to create.

C12. The Court finds that the evidence of the failure, if any, of Applicant to receive his Triavil would not have been favorable to the Applicant's incompetency claim and as such Applicant fails in this aspect of his *Brady* claim.

WHETHER THE EVIDENCE WAS MATERIAL TO THE DEFENSE

F106. Assuming that Applicant was not receiving his Triavil and assuming his counsel were not aware of

same, Applicant must establish that such evidence would have been material to his claim of incompetence.

C13. Evidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682-84, 105 S. Ct. 3375, 3383-84 (1985). *Accord Kyles v. Whitley*, 115 S. Ct. at 1565. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Kyles v. Whitley*, 115 S. Ct. at 1566; *Bagley*, 473 U.S. at 678, 105 S. Ct. at 3381.

C14. The Court finds that the great weight of the credible evidence presented in this cause suggest that neither the administration of Triavil to Applicant nor the possible failure to administer same was material to the issue of Applicant's competence to stand trial.

F107. On June 6, 1990, Applicant's principal medical diagnosis, as document by the TDCJ staffing form, were mild mental retardation, anti-social personality and hypoglycemia. State's Exhibit 2 p. 34.

F108. With respect to the Triavil prescribed to Applicant in May of 1990, both the State's expert and the Applicant's expert agreed that the dosage prescribed was small and below the recommended maintenance dosage for the majority of the population as indicated by the Physician's Desk Reference. EHSOF Vol 1 p. 163-64.

F109. At the evidentiary hearing Applicant called as his first witness, Edward B. Gripon ("Gripon"), the State's expert. EHSOF Vol. 1 p. 21.

F110. Gripon testified that he is a psychiatrist in private practice in Beaumont, Texas with a faculty appointment as an Associate Professor of Psychiatry at the University of Texas Medical Branch in Galveston. EHSOF Vol. 1 p. 22. Gripon is board certified in General Psychiatry and Forensic Psychiatry. EHSOF Vol. 2 p. 210.

F111. Gripon testified that he reviewed Applicant's medical records from the 1980's to the early 1990's. EHSOF Vol. 1 p. 25.

F112. Gripon testified that during 1990 Applicant was taking Triavil, and Cogentin for the purpose of offsetting side-effects, if any, associated with the Triavil. EHSOF Vol. 1 p. 25-26.

F113. With respect to the medication given during the May 1990 competency trial, and the issue of whether or not Applicant was administered Triavil during the competency trial, Gripon testified that either scenario should be adopted. EHSOF Vol. 1 p. 27.

F114. Gripon opined that based upon his review of the records it appeared that Applicant was being treated "predominantly, if not totally" for "mild, situational anxiety." EHSOF Vol. 1 p. 31. Gripon noted that the symptoms noted in the medical records were mild and the "dosage of the medication given would certainly have not been adequate to have treated anything substantial in the mental health field." EHSOF Vol. 1 p. 31-32.

F115. Gripon testified that the records did not reflect that symptoms were observed although Applicant reported to have difficulty sleeping, to be anxious and to be under a great deal of stress because of his situation.

Gripon thought the medication was prescribed to offset those symptoms. EHSOF Vol. 1 p. 32.

F116. When questioned concerning side effects of Triavil, Gripon noted that potential side effects include "dry mouth, blurred vision, constipation and urinary retention." EHSOF Vol. 1 p. 38. Gripon added that the majority of people do not experience side effects particularly when the medication is given in small dosage. EHSOF Vol. 1 p. 38. Gripon agreed that Tardive Dyskinesia, a permanent neurological disorder, had been associated with Triavil and antipsychotics. He added that it was rarely reported with Triavil and was more associated with high dosages. EHSOF Vol. 1 p. 39.

F117. With respect to a possible cessation or interruption of Triavil during the competency trial, Gripon testified that, given the low doses Applicant was taking, he would not expect anything to happen although there could potentially be a recurrence of whatever symptoms the medication was administered to treat. For example, Gripon explained that if the person was initially having difficulty sleeping the person might not sleep well or if the person had been anxious, the anxiety could return. EHSOF Vol. 1 p. 44.

F118. When questioned about the Cogentin, Gripon explained that the drug was sometimes given prophylactically to offset potential side effects. Gripon testified that the records did not reflect that Applicant ever experienced side effects associated with Triavil. EHSOF Vol. 1 p. 48-49.

F119. On direct examination by the State, Gripon later testified that the medical records did not support the

proposition that Applicant had any obvious psychiatric or mental disorder and added that "I don't think this man has ever been significantly, as far as his record is concerned, mentally ill." EHSOF Vol. 2 p. 216-17.

F120. Gripon testified that he felt that the Applicant's TDCJ medical diagnosis was entirely consistent with the jury's finding of competency. EHSOF Vol. 2 p. 219.

F121. Gripon added that there was no consistent support in the records for the suggestion that Applicant suffered psychosis, paranoia or schizophrenia. EHSOF Vol. 2 p. 219-20.

F122. With respect to the possibility that Applicant experienced any side effects as a consequence of the April 2, 1990 adjustment to his prescription, Gripon described the possibility as "very remote." EHSOF Vol. 2 p. 227. Gripon could find no indication in the medical records that Applicant experienced any side effects as a consequence of the April 2, 1990 prescription. EHSOF Vol. 2 p. 228.

F123. With respect to the question of whether Applicant was or was not administered Triavil during the competency trial, Gripon testified that if Applicant was not administered the medication there should not have been any serious consequence given "the dosage he was being prescribed and the minimal symptoms for which it was being given. EHSOF Vol. 2 p. 232-333.

F124. Gripon further noted that the records did not reflect any complaints by Applicant of not getting his

medication during the competency trial. EHSOF Vol. 2 p. 233.

F125. When asked if he would have any concern over Applicant's competency to stand trial assuming Applicant was not being given Triavil, Gripon replied "absolutely none." EHSOF Vol. 2 p. 234.

F126. Gripon also found it noteworthy that Applicant was examined by defense psychologist Dr. Randall Price and was subjected to the EEG at UTMB Galveston during the week of the competency trial. EHSOF Vol. 2 p. 239-241.

F127. Applicant called Dr. Jonathan Lipman ("Lipman"), a neuropharmacologist from Chicago, Illinois as an expert. EHSOF Vol. 1 p. 112. Lipman testified that he received a Ph.D. in Pharmacology from the University of Wales. EHSOF Vol. 1 p. 113. Lipman stated that he is Board Certified as a Forensic Examiner, in Forensic Medicine, Psychopharmacology and Substance Abuse. EHSOF Vol. 1 p. 113-14. Lipman stated that Neuropharmacology is the study of the effects of drugs on the body and behavior. EHSOF Vol. 1 p. 114. On voir dire by the State, Lipman acknowledged that he is not a medical doctor and could not prescribe medicine. EHSOF Vol. 1 p. 120. Lipman testified that his primary area of expertise in neuropharmacology is in the area of chronic pain and addictive drugs. EHSOF Vol. 1 p. 121. Lipman testified that he had not specifically designed research or published research in the area of trycyclic psychiatric medications.EHSOF Vol. 1 p. 122. Over objection by the State, the Court permitted Lipman to testify. EHSOF Vol. 1 p. 124-25.

F128. Like Gripon, Lipman had also reviewed Applicant's medical records. EHSOF Vol. 1 p. 117.

F129. Lipman explained that Triavil had a antidepressant and antipsychotic component. EHSOF Vol. 1 p. 117.

F130. Lipman testified that he believed that Applicant was prescribed Triavil for "depression with some psychotic features." EHSOF Vol. 1 p. 130.

F131. Lipman recognized that the doses of Triavil administered to Applicant were low doses. EHSOF Vol. 1 p. 132.

F132. Lipman testified that if the medication were interrupted there would by an "interruption of the therapeutic advantage" and that the underlying conditions could return. In the case of larger doses, Lipman testified that some people could experience of "rebound" effect where the condition comes back stronger. EHSOF Vol. 1 p. 135. Lipman indicated that sleep problems are expected. EHSOF Vol. 1 p. 136.

F133. Lipman testified that the withdrawal could "possibly" affect Applicant's thought processes and ability to communicate with his counsel. EHSOF Vol. 1 p. 137.

F134. On cross-examination, Lipman conceded that Applicant was examined by defense expert Dr. Randall Price on May 8, 1990 during the week of the competency trial.

F135. Although Lipman had previously characterized Applicant as "developmentally brain damaged, mentally retarded, suffering from major clinical depression, hallucinations and psychosis" Lipman recognized

that on June 6, 1990 the TDCJ diagnosis did not include any psychiatric condition and reflected only mild mental retardation and antisocial personality. EHSOF Vol. 1 p. 149-50.

F136. Lipman further conceded that a June 29, 1990 EEG did not reveal any abnormal characteristics of Applicant's brain, a June 29, 1990 MRI of Applicant's brain also revealed no abnormalities and that a CAT scan also reflected no abnormalities. EHSOF Vol. 1 p. 152-54.

F137. When questioned about his diagnosis of Applicant's major clinical depression, Lipman could only point to a single medical chart entry to support such a diagnosis. EHSOF Vol. 1 p. 155.

F138. When questioned about the diagnosis of paranoia and psychosis, Lipman testified that there was a reference in the record to Applicant believing the guards were talking about him or threatening him. EHSOF Vol. 1 p. 155. Lipman conceded it was possible that guards were actually talking about the Applicant. EHSOF Vol. 1 p. 156.

F139. When questioned about the diagnosis of hallucinations, Lipman could only point to a single chart entry, on February 5, 1990 referencing Applicant having heard voices several years before while on Elavil. EHSOF Vol. 1 p. 156.

F140. Lipman could reference no other objective indications in the medical records of psychosis on Applicant's part. EHSOF Vol. 1 p. 156.

F141. Lipman added that it was his "understanding" that such paranoid thoughts or hallucinations were "secondary to depression." EHSOF Vol. 1 p. 157.

F142. With respect to the April 2, 1990 prescription change, Lipman stated that the principal motivation for the change appeared to be to help the Applicant sleep. EHSOF Vol. 1 p. 162-63.

F143. As previously noted, Lipman acknowledged that the Triavil doses administered to Applicant were less than the recommended maintenance dosage as provided in the Physician's Desk Reference. EHSOF Vol. 1 p. 164. Lipman conceded that the amount of perphenazine prescribed was extremely insignificant in terms of treatment of psychosis. EHSOF Vol. 1 p. 164.

F144. When asked if he believed that the April 2, 1990 prescription change affected Applicant's competency to stand trial Lipman stated: "No." EHSOF Vol. 1 p. 165.

F145. When asked if the record reflected that Applicant experienced side effects as a consequence of the April 2, 1990 prescription, Lipman responded "No." EHSOF Vol. 1 p. 169.

F146. Lipman acknowledged instances in the medical records which indicated Applicant playing basketball on April 23 and in July. EHSOF Vol. 1 p. 170. Lipman added that Applicant "seemed to be responding nicely" to the medication. EHSOF Vol. 1 p. 170.

F147. Lipman acknowledged that there was no evidence in the record that Applicant had ever been forcibly administered medication. EHSOF Vol. 1 p. 171.

F148. When questioned about the possibility that Applicant was not administered Triavil during the competency trial, Lipman conceded that the medical records

did not reflect the recurrence of any underlying symptoms the medication was given to treat. EHSOF Vol. 1 p. 178-79.

F149. Lipman agreed that there were no objective signs in the records that Applicant experienced any withdrawal symptoms during the week of the competency trial. EHSOF Vol. 1 p. 180.

F150. Following the July 3, 1990 evidentiary hearing, the Applicant was given the opportunity to depose former TDCJ psychiatrist Santiago Caberto ("Caberto") of Florida. Dr. Caberto was deposed by the parties on July 14, 1997.

F151. Caberto testified that he worked for TDCJ as a psychiatrist from 1982 through 1991. Deposition of Santiago Caberto at p. 8-9. At the time of the deposition Caberto testified that he was 72 years old, had recently been diagnosed with prostatic cancer and his memory was failing. Deposition of Santiago Caberto at p. 40. Caberto testified that much of his testimony concerning Applicant was based upon a reading of the medical notes. Deposition of Santiago Caberto at p. 40-41. Caberto testified that his memory of Applicant was vague. Deposition of Santiago Caberto at p. 41.

F152. During his tenure with TDCJ Caberto worked at the Ellis 1 Unit where Applicant was housed. Deposition of Santiago Caberto at p. 42.

F153. Caberto testified that Applicant's principal diagnosis was mild mental retardation with behavioral symptoms, antisocial personality disorder and hypoglycemia. Deposition of Santiago Caberto at p. 44.

F154. Caberto personally saw Applicant on April 26, 1990, June 21, 1990, July 15, 1990, September 13, 1990, October 4, 1990, October 25, 1990, November 19, 1990 and December 10, 1990. Deposition of Santiago Caberto at p. 45-46.

F155. Caberto described Applicant psychiatric diagnosis as "adjustment reaction with mixed emotional anxiety and depression." Deposition of Santiago Caberto at p. 46. Caberto stated that these were not major psychiatric concerns and were common in a prison setting. Deposition of Santiago Caberto at p. 47. When asked if the records reflected that Applicant suffered any major psychotic problems, Caberto replied that he did not observe any. Deposition of Santiago Caberto at p. 47. Caberto indicated that he saw only one reference in the records to hallucinations. Deposition of Santiago Caberto at p. 47.

F156. Caberto stated that it appeared to him that the psychiatric medications prescribed to Applicant were primarily prescribed to treat the "adjustment situation" which Caberto explained "could be mixed – anxiety and depression" and added "it's like situational problem, to adjust to that situation." Deposition of Santiago Caberto at p. 48.

F157. With respect to the April 2, 1990 prescription change, Caberto testified that he saw Applicant afterwards on April 26, 1990. Deposition of Santiago Caberto at p. 52. During the visit Applicant spoke with Cabeito concerning a possible change of venue on his case, that his lawyer was trying to get him a CAT scan, and that he was going to be seen by an outside psychologist and psychiatrist that day. Deposition of Santiago Caberto at p.

50. At the time of the visit, Caberto described Applicant as Oriented times three and Alert times three. Deposition of Santiago Caberto at p. 53. Caberto explained that he would not have used such a description for someone experiencing psychosis or significant depression.

F158. During his involvement with Applicant, Caberto testified that Applicant never experienced side effects from taking Triavil and the records did not reflect any such side effects. Deposition of Santiago Caberto at p. 57.

F159. Caberto testified that Applicant was administered low doses of Triavil. Deposition of Santiago Caberto at p. 59.

F160. Caberto stated that the Triavil doses would not have been sufficient to treat a major psychotic disorder or major depression. Deposition of Santiago Caberto at p. 59.

F161. Caberto stated that he continued the Cogentin prescription on April 26, 1990 not because he observed Applicant suffering any side effects from Triavil but rather because the prescription for Cogentin had already been written. Deposition of Santiago Caberto at p. 60.

F162. On October 4, 1990, after learning that Applicant had quit taking his medication, Caberto discontinued Applicant's prescription for Triavil and Cogentin. While the chart reflected that Applicant had quit taking his medication as early as September 30, 1990 (State's Exhibit 2 p. 8) on October 4, 1990 Caberto stated that Applicant did not appear to be experiencing a relapse of

symptoms and appeared to be handling the discontinuation of his medication quite well. Deposition of Santiago Caberto at p. 78. Caberto noted that at the time Applicant appeared "mentally, essentially the same." Deposition of Santiago Caberto at p. 77.

F163. Caberto next saw Applicant on October 25, 1990 at which time Applicant wanting his medication back because it helped him relax and was having difficulty getting to sleep. Deposition of Santiago Caberto at p. 79. Caberto testified that Applicant requested just the Triavil 4-50 and Cogentin but not the Triavil 2-10. Deposition of Santiago Caberto at p. 79. Caberto noted that Applicant had "no thought disorders" but reinstated the medication. Deposition of Santiago Caberto at p. 79. By "no thought disorders" Caberto explained that he meant that Applicant was not experiencing any psychotic disorder, disorientation, perceptual problems, hallucinations or delusional fear or paranoia. Deposition of Santiago Caberto at p. 82.

F164. Caberto testified that Applicant was fairly knowledgeable concerning the medication he was on and the benefits that it provided. Deposition of Santiago Caberto at p. 81.

F165. Caberto testified that Applicant was classified as capable of working and in fact worked in the garment factory at the Ellis I Unit. Deposition of Santiago Caberto at p. 81. With respect to Applicant's Triavil prescription, Caberto testified that it was not something that would have precluded him from working in the garment factory and that he should not have had any problem working. Deposition of Santiago Caberto at p. 81-82.

F166. Finally, Caberto testified that there was no indication in the records of Applicant ever complaining of not getting his medication as prescribed. Deposition of Santiago Caberto at p. 87.

C15. Evidence concerning the administration of Triavil, or the lack thereof, to Applicant is immaterial to the issue of Applicant's competency to stand trial. That is, even if counsel for Applicant had known at the time of Applicant's competency hearing everything he alleges was withheld from him, there is not a reasonable probability of a different outcome to Applicant's competency trial.

F167. Clearly, the evidence in this case reflects that Applicant's counsel were aware of the Triavil prescription and attempted to utilize same as evidence of the Applicant's incompetency. The jury rejected this contention.

C16. Assuming Applicant was not administered his medication as prescribed during the competency trial the court finds that any such evidence of same, under the circumstances presented, would be immaterial to the issue of Applicant's competency and would not have affected the outcome of the proceeding.

F168. Assuming Applicant was not administered his medication as prescribed during the competency trial, there is no evidence before the Court at present, nor was there evidence at the time, that Applicant ever complained of not receiving his medication or suffered any adverse reaction to any such interruption in his medication.

F169. The Court further finds noteworthy that the credible evidence in the case suggests, with respect to the claimed interruption in Applicant's medication, that in October of 1990 the medical records reflect that Applicant apparently discontinued his psychiatric medication for almost a month without adverse consequence.

C17. The Court finds that Applicant has failed to establish the materiality aspect of his *Brady* claim.

C.

FINDINGS AND CONCLUSIONS AS TO APPLICANT'S CLAIMS THAT THE STATE VIOLATED *GIGLIO V. UNITED STATES* BY ALLOWING A WITNESS TO GIVE FALSE TESTIMONY

F170. Applicant also argues that the prosecutor knowingly presented false evidence in violation of his right to due process of law. Specifically, Applicant alleges that during the competency trial, the prosecutor knowingly elicited false evidence regarding the amount and type of medication applicant was taking.

F171. Specifically, Applicant complains that on cross-examination of Dr. Mount, District Attorney Joe Price suggested before the jury that Applicant was only taking "one tablet and that is at night to sleep." Applicant's petition at paragraph 38.

F172. At the time of the cross-examination, Applicant had received the aforementioned April 2, 1990 prescription of Cogentin 1 mg twice daily and a Triavil 4-50 and 2-10 p.m.

F173. District Attorney Joe Price explains the oversight as follows:

> At the time of the competency trial, I sought to ensure that both the State and the defense had a complete set of Mr. Penry's T.D.C. medical records. In this regard, I discussed with Mr. John Wright, Penry's lead defense attorney, the possible exchange of Penry's T.D.C. records. I then requested my investigator Ron Dunnahoe to get with John Wright and exchange the medical records that the prosecution had been provided for the records previously obtained by the defense. The records obtained from the defense were much more detailed and voluminous than the one's subpoenaed by the state previously from T.D.C.
>
> * * *
>
> From the medical records that I had reviewed at the time it was my understanding that Mr. Penry was only being administered one psychiatric medication including an evening dose which was to help him sleep. I am now aware that Mr. Penry's medication had been adjusted approximately five weeks before the competency trial but I do not believe that I was aware of that prescription change at the time of the competency trial. Any mistake that I made in this regard was not intentional but was likely attributable to the fact that the state did not have a comprehensive set of Mr. Penry's T.D.C. medical records until the time of the competency trial as previously noted.

Exhibit "B" to State's Answer.

C18. To obtain relief on his claim that the State knowingly presented false evidence, Applicant bears the burden of proving that (1) the State presented false testimony, (2) the false testimony was material, and (3) the prosecution offered the testimony knowing it to be false. *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763, 766 (1963); *Carter v. Johnson*, ___ F.3d ___, 1997 WL 169401 *3 (5th Cir. (Tex.) April 9, 1997); *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994); *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982), *appeal dism'd, cert. denied*, 461 U.S. 951, 103 S. Ct. 2419 (1983); *United States v. Brown*, 634 F.2d 819, 827 (5th Cir. 1981). False evidence is "material" only when it is such that it could have reasonably affected the verdict. *See Giglio*, 405 U.S. at 154, 92 S. Ct. at 766; *May v. Collins*, 955 F.2d 299, 315 (5th Cir.), *cert. denied*, 504 U.S. 901, 112 S. Ct. 1925 (1992). Regarding the prosecution's knowledge of the falsity of the evidence,

> due process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements.

United States v. Sutherland, 656 F.2d 1181, 1203 (5th Cir. 1981) (quoting *United States v. Brown*, 634 F.2d at 827). *See also Smith v. Black*, 904 F.2d 950, 961 (5th Cir. 1990).

F174.The Court finds although the testimony elicited from Dr. Mount was inconsistent with the April 2, 1990 prescription in that Applicant was receiving two Triavil pills (the 4-50 and the 2-10), rather than just one, plus the 1mg Cogentin twice daily, the undisputed testimony from

Gripon, Lipman and Caberto is that the doses prescribed Applicant were minimal doses and were, in large part, prescribed to assist Applicant with sleeping.

F175. The Court further finds that Applicant has failed to demonstrate that the attorney for the State knowingly elicited from Applicant's witness, Dr. Mount, inaccurate evidence concerning the amount and type of medication Applicant was receiving. Dr. Mount was adverse to the State, and he was in possession of, and had reviewed, the records about which he was questioned. The State's attorney could not have expected that Dr. Mount would testify inaccurately regarding the records reviewed by Dr. Mount.

C19. Because Applicant has failed to demonstrate that the attorney for the State knowingly procured false evidence, Applicant's claim that he was denied due process of law as a result of the inaccuracy of the evidence adduced by the State's attorney must be denied.

C20. Having previously found that evidence concerning Applicant's psychiatric medication was immaterial to the outcome of the competency trial, the Court finds that any discrepancy between the testimony elicited from Dr. Mount and the April 2, 1990 prescription was minimal and immaterial to the issue of Applicant's competency and the outcome of the trial.

F176. To the extent that the testimony of Dr. Mount was false, the Court finds no evidence that the attorney for the State procured the testimony knowing that it was false.

C21. The Court finds that Applicant has failed to establish his *Giglio* claim.

D.

FINDINGS AND CONCLUSIONS AS TO APPLICANT'S CLAIM THAT CHANGES TO HIS PSYCHIATRIC MEDICATION VIOLATED APPLICANT'S RIGHTS UNDER *RIGGINS V. NEVADA*, 504 U.S. 127, 112 S.CT. 1810 (1992).

F177. With respect to his psychiatric medication, Applicant next argues that the changes to, and claimed interruptions in, his psychiatric medication violated the dictates of *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810 (1992).

F178. In *Riggins*, the United States Supreme Court held that the defendant's due process rights were violated where, over the defendant's objection, and without a trial court finding that the forced administration of antipsychotic medication was necessary, the defendant was involuntarily administered antipsychotic medication during his trial. 112 S.Ct. at 1817.

C22. The Court finds that the instant case is distinguishable from and not controlled by *Riggins*.

F179. In *Riggins*, the defense filed a motion with the District Court seeking an order suspending the administration of Melleril and Dilantin until the end of Riggins' trial. 112 S. Ct. at 1812.

F180. In the instant case, not only did Applicant not object to the administration of Triavil to Applicant but Applicant's counsel knew that Applicant was prescribed

Triavil and Cogentin and introduced testimony concerning Applicant's psychiatric medication as evidence in support of Applicant's claim of incompetence.

F181. In *Riggins*, the defendant testified. 112 S.Ct. at 1813.

F182. In the instant case Applicant did not testify.

F183. In *Riggins*, the administration of the medication was involuntary.

F184. In the instant case, the administration of medication to Applicant was voluntary.

F185. In *Riggins*, the Supreme Court noted that the "record in this case narrowly defines the issues before us." 112 S.Ct. at 1814.

C23. In *Ex Parte Thomas*, 906 S.W.2d 22 (Tex.Crim.App. 1995), the Texas Court of Criminal Appeals construed *Riggins* to be limited to the specific facts of that case and held that the applicant failed to state a claim of denial of due process where the applicant was found not to have objected to the administration of antipsychotic medication. 906 S.W.2d at 24-25. The Court stated:

> [A]pplicant fails to show anywhere in the record that he was forced to take the medication or that there was even an objection to his being medicated at trial. Since the record does not demonstrate that the applicant's treatment with antipsychotic drugs was involuntary, *Riggins* is inapplicable and applicant's due process contention is without merit.

906 S.W.2d at 24. The Court added "it is clear that the trial strategy of the defense was to use appellant's medication to their advantage." 906 S.W.2d at 25.

C24. The instant case is controlled by *Ex Parte Thomas*. Applicant did not object to the administration of Triavil or Cogentin and his *Riggins* claim is without merit.

C25. To the extent that Applicant argues that the claimed interruption of his medication implicates *Riggins*, the Court also finds this claim unmeritorious.

F186. Applicant has presented no evidence to the Court that he was denied his medication during the capital murder trial.

F187. At the core of *Riggins* was the argument that the forced administration of Mellaril on the defendant, who was asserting an insanity defense, possibly impacted Riggins' appearance, the content of his testimony, his ability to follow the proceedings and the substance of his communication with counsel. 112 S.Ct. at 1816.

F188. In the instant case, the Court cannot conclude that any interruption in Applicant's medication presented similar concerns at his *competency* trial where, by its very nature, Applicant's counsel were seeking to have the jury find Applicant incompetent. Applicant's expert Lipman testified that Applicant's thought processes, ability to communicate with his counsel, and his ability to understand the proceedings might have been affected. EHSOF Vol. 1 p. 137. Such are elements that Applicant is required to prove to establish incompetence.

C26. The essence of Applicant's argument in this regard is that the claimed interruption of his medication

rendered him incompetent to participate in his competency trial. Such an argument is disingenuous. Assuming Applicant was not administered his Triavil, the Court finds that same would have, if anything, worked to his advantage in the competency trial.

C27. The Court finds that Applicant's *Riggins* claim is without merit.

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT II OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F189. Applicant claims in his second ground for relief that the sentencing instructions and special issues prevented the jury from giving ' "independent mitigating weight' to evidence showing diminished moral culpability and mitigating aspects of his character and record" and that the trial court erred in failing to give his requested instructions. Petition at 19. Applicant further contends that the failure to give his requested instructions violated his eighth and fourteenth amendment rights. This claim was raised and rejected on direct appeal. *Penry*, 903 S.W.2d at 764-65.

C28. Because the claim raised in Applicant's second ground for relief was raised and rejected on direct appeal, the Court need not address his claim in this proceeding. *Ex parte Acosta*, 672 S.W.2d at 472.

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT III OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F190. Applicant claims in his third ground for relief that his eighth and fourteenth amendment rights were violated when the trial court refused to allow him to introduce a document signed by him purporting to waive his eligibility for parole if given a life sentence. This claim was raised and rejected on direct appeal. *Penry*, 903 S.W.2d at 763-64.

C29. Because the claim raised in Applicant's third ground for relief was raised and rejected on direct appeal, the Court need not address his claim in this proceeding. *Ex parte Acosta*, 672 S.W.2d at 472.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT IV OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F191. Applicant claims in his fourth ground for relief that his constitutional rights were violated when the trial court refused to allow him to introduce evidence of his mother's mental illness at the punishment phase of his trial. This claim was raised and rejected on direct appeal. *Penry*, 903 S.W.2d at 762.

C30. Because the claim raised in Applicant's third ground for relief was raised and rejected on direct appeal, the Court need not address his claim in this proceeding. *Ex parte Acosta*, 672 S.W.2d at 472.

V.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT V OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F192. Applicant claims in his fifth ground for relief that his constitutional rights were violated when the trial court refused to grant his motion for a change of venue. This claim was raised and rejected on direct appeal. *Penry*, 903 S.W.2d at 730-31.

C31. Because the claim raised in Applicant's third ground for relief was raised and rejected on direct appeal, the Court need not address his claim in this proceeding. *Ex parte Acosta*, 672 S.W.2d at 472.

VI.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT VI OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F193. Applicant claims in his sixth ground for relief that the hearing to determine the admissibility of his confession was "constitutionally infirm and unreliable." Petition at 32. More particularly, Applicant claims that the hearing on the admissibility of his confession was "constitutionally infirm and unreliable" because the trial court applied an incorrect standard for determining the admissibility of his confession. This claim was raised and rejected on direct appeal. *Penry*, 903 S.W.2d at 744-47.

C32. Because the claim raised in Applicant's third ground for relief was raised and rejected on direct appeal,

the Court need not address his claim in this proceeding. *Ex parte Acosta*, 672 S.W.2d at 472.

VII.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT VII OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F194. Applicant claims in his seventh ground for relief that the time taken to decide his appeals has rendered his death sentence cruel and unusual in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 13 and 19 of the Texas Constitution.

F195. Applicant has not been confined for a lengthy period with the *certainty* that the State would execute. The time spent since Applicant was charged with the offense for which he is presently under a sentence of death has been due to protecting Applicant's constitutional rights and providing conscientious review of his many challenges to his conviction and sentence.

F196. The State has not unreasonably delayed imposing Applicant's death sentence.

F197. The State of Texas, as in Montana, has not "set up a scheme to prolong the period of incarceration, or rescheduled the execution repeatedly in order to torture" Applicant. *McKenzie v. Day*, 57 F.3d at 1466 (panel opinion).

F198. Applicant does not allege, much less demonstrate, that his execution at this time would be any more

or less severe than if it had been imposed shortly after the death sentence was assessed.

F199. Applicant complained for the first time about the length of time taken to resolve his legal challenges to his conviction and sentence in his application for habeas corpus relief, filed April 21, 1997.

C33. Applicant's claim that the extended period between sentencing and execution constitutes cruel and unusual punishment fails to state a constitutional violation. *See, e.g., Lackey v. Johnson*, 83 F.3d 116 (5th Cir.) (inordinate delay in carrying out an execution does not violate the prisoner's Eighth Amendment rights), *cert. denied*, 117 S.Ct. 276 (1996); *White v. Johnson*, 79 F.3d 432 (5th Cir.) (rejecting claim that seventeen-year period between sentencing and execution constitutes cruel and unusual punishment), *cert. denied*, 117 S.Ct. 275 (1996); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir.) ("We conclude that Appellant has failed to show that executing him after fifteen years on death row, during which he faced at least seven execution dates, would constitute cruel and unusual punishment.") *cert. denied*, 115 S.Ct. 2640 (1995); *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir.) (en banc) ("We thus decline to recognize Richmond's lengthy incarceration on death row during the pendency of his appeals as substantively and independently violative of the Constitution." (citation omitted)), *cert. denied*, 1.15 S.Ct. 1840 (1995); *Free v. Peters*, 50 F.3d 1362 (7th Cir.) (rejecting claim that execution after approximately two decades of appellate and collateral review of death sentence constitutes cruel and unusual punishment), *cert. denied*, 115 S.Ct. 1397. *See also Rooney v. North Dakota*, 196 U.S. 319 (1905) (holding *Ex Post Facto* clause not violated

where time between sentencing and execution extended, because extension of time "was clearly to [defendant's] advantage.").

C34. In order to demonstrate a violation of the constitutional prohibition of cruel and unusual punishment the Applicant must satisfy one of the two tests articulated by the Supreme Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989). Specifically, applicant may demonstrate a violation of the Eighth Amendment only if (1) it would have " 'been considered cruel and unusual at the time the Bill of Rights was adopted,' " *Stanford v. Kentucky*, 492 U.S. at 368, *quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986), or (2) it offends " 'the evolving standards of decency that mark the progress of a maturing society.' " *Stanford v. Kentucky*, 492 US. At 369, *quoting Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

C35. Applicant's claim inappropriately intermingles the two separate standards articulated in *Stanford*. Specifically, Applicant may not avail himself of the procedures that mark the evolving standards of decency that adhere to capital sentencing in the twentieth century and then complain that proceeding to execution would have been considered cruel and unusual at the time of the Bill of Rights was enacted, because the limited procedures available at the time the Bill of Rights was enacted were satisfied in a shorter time period.

C36. Because neither incarceration or imprisonment alone constitute cruel and unusual punishment, Applicant's claim must be that incarceration and execution in combination are disproportionate punishment for his crime.

C37. Applicant may not support his proportionality argument with the attitudes of eighteenth-century writers regarding crime and punishment. Proportionality is purely an issue of the second Stanford test and must be addressed in the context of contemporary standards. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 961-64 (199 1) (Scalia, j., writing for plurality) (suggesting proportionality review itself is purely a contemporary practice); Id. at 997-1000 (1991) (Kennedy, J., concurring) (identifying factors relevant to proportionality review, which accounts for, *inter alia*, "differing attitudes and perceptions about local conditions"); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding capital punishment disproportionate punishment for rape because, *inter alia*, in post-Furman era only three states had provided death penalty for rape.)

C38. Applicant's execution would not violate contemporary standards of decency. *See Stafford v. Ward*, 59 F.3d at 1028 (noting that no federal court has agreed that prolonged period between sentencing and execution can render unconstitutional an otherwise valid death sentence); *McKenzie v. Day*, 57 F.3d 1461, 1466 (9th Cir.) ("With all due respect to our colleagues abroad, we do not believe [the view taken by foreign jurisdictions regarding the viability of a claim that a prolonged period of time between sentencing and execution can render an otherwise valid death unconstitutionally cruel and unusual] will prevail in the United States."), *opinion adopted*, 57 F.3d 1493 (en banc), *cert. denied*, 115 S. Ct. 1840 (1995). In addition to the fact that not a single American court has recognized a constitutional violation due to an extended time period between sentencing and execution,

the actions, or lack of action, by the legislative bodies within the United States – "[t]he clearest and most reliable objective evidence of contemporary values, *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) – demonstrates that executing Applicant after an extended period of time between sentencing and execution does not offend contemporary American values. That is, Applicant cannot demonstrate that executing him after an extended period between sentencing and execution offends contemporary American values, because no legislative body with the United States has sought to legislate the rule Applicant seeks, i.e., the rule that a death sentence must be carried out within a prescribed period of time or the otherwise valid death sentence is automatically commuted to a life sentence. *See also* USUN Press Release No. 49-(95) (March 29, 1995) (statements of officials from Clinton Administration before Human Rights Committee at the United Nations, specifically reserving rights under International Covenant on Civil and Political Rights regarding claim that extended period between sentencing and execution constitutes cruel and unusual punishment or otherwise violates International Covenant).

C39. The foreign authorities cited by Applicant do not support Applicant's claim that his execution would constitute cruel and unusual punishment. The Supreme Court has "emphasized that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant." *Stanford v. Kentucky*, 492 U.S. at 369 n. 1.

C40. Assuming *arguendo* that the circumstances at the time the Bill of Rights was enacted inform the Eighth

Amendment issue in this case, applicant has filed to demonstrate that his execution after an extended period between sentencing and execution would have been considered cruel and unusual at the time the Bill of Rights was enacted. While pre-execution delay was unusual in the eighteenth century, Applicant does not demonstrate that it would have been considered cruel, particularly where the delay is due to appellate and collateral review of the conviction and sentence.

C41. Applicant's reliance on what contemporary English jurists claim eighteenth century English jurists might have thought do not support his claim that execution after an extended period of time between sentencing and execution would have been considered cruel and unusual. While English jurisprudence of the eighteenth century interpreting the antecedents to provisions in our Constitution may be relevant to what the framers of our Constitution intended, contemporary assessments by foreign jurisdictions of what eighteenth century English jurists might have thought are not. *See Stanford v. Kentucky*, 492 U.S. at 369 n. 1.

C42. Assuming *arguendo* that Applicant could demonstrate a constitutional right to a speedy appellate review, applicant may not rely on time spent prior to any objection being made or any notification given to the courts that he deemed delay prejudicial. The State and courts could reasonably expect that any delay was to Applicant's benefit. *See and compare Lockhart v. Fretwell*, 506-U.S. 364, 372-73 (1993) ("federal habeas petitioner has no interest in the finality of his conviction"); *Biddle v. Perovich*, 274 U.S. 480, 487 (1927) ("By common understanding imprisonment for life is a less penalty than

death."); *Rooney v. North Dakota*, 196 U.S. 319 (1905) (holding *Ex Post Facto* clause not violated where time between sentencing and execution extended, because extension of time "was clearly to [defendant's] advantage").

C43. Again, assuming *arguendo* that Applicant could establish a constitutional right to a speedy appellate review, he would not be entitled to habeas relief in the form of a commutation of his sentence or outright release from custody. Applicant's alleged constitutional violation does not call into question the validity of his sentence when rendered, and the alleged constitutional violation will not cause Applicant's subsequent execution to be any more severe than it would have been if it had been imposed shortly after sentence was assessed. *See and compare State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) ("The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot . . . add an element of cruelty to a subsequent execution."); *McKenzie v. Day*, 57 F.3d at 1467 (panel opinion) ("whatever anguish McKenzie has suffered is in the past and cannot be undone"; only effect of vacating death sentence due to length to time since sentencing would be "to punish the state and perhaps speed up the rate of executions, but it would not relieve McKenzie and those in his position of the pain they have already suffered.").

VIII.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT VIII OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F200. In his eighth claim for relief, applicant claims that execution by lethal injection constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment.

F201. In this regard, applicant merely reasserts unfounded claims which have been previously addressed and rejected by the courts. Applicant fails to cite a single authority that is consistent with his claim that execution by lethal injection is unconstitutional in the abstract, or as administered by the State of Texas.

F202. Applicant's concerns about execution by lethal injection can be summarized as follows:

1) TDCJ does not have detailed standards or procedures for the executioners to follow thus creating a "risk" of pain and suffering (Applicant's petition at paragraph 111);

2) TDCJ has no rules or regulations to ensure that executioners are properly trained (Applicant's petition at paragraph 112); and,

3) TDCJ has no written guidelines concerning the preparation of the drugs or the sequence in which they are to be administered (Applicant's petition at paragraph 112).

C44. Each contention has been expressly rejected by courts that have considered same.

C45. In 1978 the Texas Court of Criminal Appeals established that the Texas lethal injection method established by Article 43.14 of the Code of Criminal Procedure did not constitute cruel and unusual punishment under either the federal or state constitution. *Ex parte Granviel*, 561 S.W.2d 503, 510 (Tex.Crim.App. 1978). In *Granviel*, the Appellant argued that it could not be ascertained from the statute what substance or substances would be used in the injection. Id. In reply the State argued that the earlier execution statutes were not detailed. Id. For example, the State noted that electrocution statutes failed to specify that a chair would be used, the amount of voltage, the volume of amperage, the place of attachment of electrodes and whether AC or DC current should be used. Id. Further the earlier hanging statutes had not specified the type of gallows, the height of fall, or the type of rope or knot to use. Id. Finally, the laws relating to death by firing squad had not specified the number of executioners, the muzzle velocity of the rifles, the type of bullets or the distance of the guns to the condemned. Id. After, analyzing pertinent authorities, the Court of Criminal Appeals concluded that the failure to specify the exact substances and the procedures to be used did not render the statute unconstitutionally vague. Id. at 513.[5] In response to Appellant's claims of possible complications

[5] In reaching its decision, the Texas Court of Criminal Appeals was apprised of the fact that the decision had been made by the Department to use sodium thiopental. The Court noted the habeas hearing testimony of Dr. Gary Harold Wimbish, a toxicologist and assistant professor of Pathology that he would not have advised against the use of sodium thiopental if consulted by the TDC. 561 S.W.2d at 508.

in the administration of the lethal injection (like those of the applicant herein) the Court added:

> We conclude that the possibility, should it arise, does not make the means of inflicting death inherently cruel. Rather, it could be characterized as a possible discomfort or suffering necessary to a method of extinguishing life humanely.

561 S.W.2d at 510.

C46. In *Woolls v. McCotter*, 798 F.2d 695 (5th Cir. 1986), *cert. denied*, 478 U.S. 1031, 107 S.Ct. 15 (1986), the Fifth Circuit rejected the claim that execution by lethal injection in the State of Texas constituted cruel and unusual punishment. Id. at 698. Like Applicant in the instant case, the appellant argued that the "use by the Texas Department of Corrections of sodium thiopental- . . . when administered by untrained personnel or in improper dosages . . . may cause conscious death by suffocation." Id. The Fifth Circuit rejected the contention finding it to be "premised on supposition unsupported by fact." Id. The similarity between the arguments in *Wools* and the instant case are striking.

> The appellant proffers the affidavit of Dr. Ward Casscells, which recites an American Medical Association recommendation that a physician should not be a participant in a legally authorized execution. The appellant then offers the affidavit of Dr. Leroy David Vandam, which asserts that, even if administered by an expert, the injection of sodium thiopental may cause physical and mental pain due to possible technical difficulties in administering the drug. Finally, the appellant submits the affidavits of

> Dr. Richard S. Hodes, who concludes that, even if administered by a professional, individual responses to this drug can be quite varied. Thus if an individual is not rendered unconscious before the injection of the paralytic drug, the individual would be aware of the onset of loss of consciousness and the paralytic drug would produce a sense of shortness of breath and suffocation over a two to three minute period. Depending on the specific paralytic drug administered, the individual may also experience a sensation of multiple electric shocks over the entire body with erratic muscle twitching followed by acute paralysis and suffocation.

Id. at 696-98. The Fifth Circuit rejected the contention stating:

> First, the appellant has not even alleged, much less produced any evidence, that the Texas Department of Corrections allows anyone other than trained medical personnel to administer lethal injections. Second, the appellant has neither alleged nor produced evidence that would indicate that improper dosages of sodium thiopental have been or will be administered so as to result in physical or mental pain. Finally, even if the physical and mental manifestations noted by Dr. Hodes were experienced by an individual, this showing "of discomfort or unnecessary pain falls far short of the showing found insufficient in Gray v. Lucas [710 F.2d 1048, 1057-61 (5th Cir.), cert. denied, 463 U.S. 1237, 104 S.Ct 211, 77 L.Ed2d 1453 (1982)]."

798 F.2d at 698.

C47. The argument that lethal injection is unconstitutional if administered by an unqualified person was

reasserted in *Kelly v. Lynaugh*, 862 F.2d 1126 (5th Cir. 1988) *cert. denied*, 492 U.S. 925, 109 S.Ct. 3263 (1989). In *Kelly*, the Fifth Circuit rejected the appellant's claim of cruel and unusual punishment holding that the matter had already been resolved in *Woolls, supra*. 862 F.2d at 1135.

C48. Recent federal pronouncements are consistent with the earlier holdings maintaining the constitutionality of lethal injection. In *Hill v. Lockhart*, 791 F.Supp 1388 (E.D. Ark. 1992) the United State District Court for the Eastern District of Arkansas addressed the constitutionality of lethal injection in Arkansas and the absence of a physician at the executions. Judge Woods stated:

> The absence of a physician at an execution is hardly a deprivation of a constitutional right. It should be pointed out that no proof has been adduced that a physician was not present at the other executions mentioned by petitioner or that a physician will not be present at petitioner's execution. Petitioner seeks to implicate the federal constitutional right that to be free from cruel and unusual punishment on the basis that it is sometimes difficult to locate a vein suitable for an intravenous injection. Petitioner attempts to attribute such difficulty to the absence of a physician. However, it must be noted that even in a hospital setting intravenous injections are generally given by a nurse or other medical personnel. On the rare occasion when there is difficulty in locating a vein, more than a single needle insertion may be necessary. This is hardly cruel and unusual punishment contemplated by the Eight Amendment.

There is general agreement that lethal injection is at present the most humane type of execution

> available and is far more preferable to the sometimes barbaric means employed in the past. Many states have now abandoned other forms of execution in favor of lethal injection.

791 F.Supp. at 1394.

C49. In *LaGrand v. Lewis,* 883 F.Supp. 469 (D. Ariz. 1995) the petitioners claimed that the Arizona lethal injection procedure was constitutionally deficient for reasons similar to those asserted in the instant case. Specifically, the petitioners offered an expert affidavit seeking to establish that the Arizona three drug execution procedure was "fraught with substantial risk of pain to the condemned." Id. at 470. The expert, Dr. Palmer, reviewed the Internal Management Procedures of the Arizona prison system and concluded that there were insufficient guidelines controlling the dosage, sequence and delivery rate of the drugs. Id. The affidavit of Dr. Palmer further noted that the Procedures did not prescribe a level of training for the executioner. Id. It was asserted that "severe infliction of pain could result from repeated attempts to insert the intravenous catheter into the condemned's veins." Id. Finally, Dr. Palmer stated that "if the catheter is not inserted in a vein, the drugs would be injected into the muscle tissue, producing a much slower rate of absorption." Id.

Rejecting the petitioners' arguments, the district court held "the written procedures are not constitutionally infirm simply because they fail to specify in explicit detail the execution protocol. Petitioners' argument challenging the procedural safeguards *is based entirely on speculation.*" Id. (emphasis added). "The court therefore concludes the petitioners have not carried their

burden of showing that the challenged method exposes them to more than a negligible risk of being subjected to a cruel and wanton infliction of pain." Id. at 471.

F203. In the instant case, the factual basis of applicant's claim is as lacking as those of the petitioners in the preceding authorities.

F204. While applicant questions the adequacy of the TDCJ execution policies and procedures, Applicant fails to establish by competent evidence that any of the potential "risks" have in actual practice occurred.

F205. Moreover, Applicant has not established that the personnel employed to carry out Texas executions are, in fact, inadequately trained.[6]

F206. Finally, Applicant cannot demonstrate that the drugs used in the Texas lethal injection process are currently, or have ever been, injected in an improper sequence or dosage so as to actually result in a "botched" execution.

F207. Notably, the supporting affidavits to Applicant's petition reveal only anecdotal instances of claimed improprieties in the Texas execution process. In fact, it should be noted that in the list of so-called "botched executions" included in the Radelet and Denno, affidavits

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[6] Tex. Code of Criminal Procedure, Article 43.20 entitled "Present at Execution" includes among those that may be present during an execution "the executioner, and such persons as may be necessary to assist him in conducting the execution . . . , two physicians, including the prison physician . . . ."

(attached as Exhibits "F" and "G" respectively to applicant's petition) there is no mention of an inefficient execution in the State of Texas in the *last five years*.

C50. Regarding Applicant's concern over the possibility of multiple catheter insertions, the foregoing authorities reflect that same is simply not a matter of constitutional concern or dimension. The Court takes judicial notice that such a problem, to the extent that it can be so characterized, occurs on a daily basis in hospitals across the country.

C51. It can hardly be seriously contended that what may be essential to routine medical care in this country becomes "cruel and unusual punishment" when encountered in the execution process.

F208. Applicant makes no showing that he has been an IV drug user or suffers from any of the infirmities commonly associated with such, i.e., constricted or damaged veins.

F209. The execution information packet attached as tab 2 to the Egbert affidavit (Exhibit "E" to applicant's petition) clearly notes that "a medically trained individual (not to be identified) shall insert an intravenous catheter into the condemned person's arms and cause a saline solution to flow."

F210. Applicant fails to demonstrate a single instance where this has not in fact occurred.

C52. The fact that TDCJ does not have detailed standards or procedures for implementing a lethal injection execution does not render the execution method of lethal

injection unconstitutional. *See and compare Ex parte Granviel*, 561 S.W.2d 503 (Tex.Crim.App. 1978); *Woolls v. McCotter*, 798 F.2d 695 (5th Cir.), *cert. denied* 478 U.S. 1031 (1986); *LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz. 1995).

C53. The absence of a physician at an execution does not render lethal injection cruel and unusual. *See, Woolls v. McCotter*, 798 F.2d 695 (5th Cir.), *cert. denied* 478 U.S. 1031 (1986); *Kelly v. Lynaugh*, 862 F.2d 1126 (5th Cir. 1988), *cert. denied*, 492 U.S. 925 (1989); *Hill v. Lockhart*, 791 F.Supp. 1388, 1394 (E.D. Ark. 1992).

C54. Applicant's conclusory allegation that there are no rules or regulations to ensure that executioners are properly trained fails to demonstrate that lethal injection executions are being administered in a manner that would constitute cruel and unusual punishment. *See and compare Kelly v. Lynaugh*, 862 F.2d 1126 (5th Cir. 1988), *cert. denied*, 492 U.S. 925 (1989); *Hill v. Lockhart*, 791 F.Supp. 1388, 1394 (E.D. Ark. 1992).

C55. The absence of written guidelines concerning the preparation of drugs or the sequence in which they are to be administered in a lethal injection execution does not render the execution cruel and unusual punishment. *See Ex parte Granviel*, 561 S.W.2d 503 (Tex.Crim.App. 1978); *Woolls v. McCotter*, 798 F.2d 695 (5th Cir.), *cert. denied* 478 U.S. 1031 (1986); *LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz. 1995).

C56. Because Applicant has failed to make an evidentiary showing that the procedures utilized by the TDCJ are actually being employed in an unconstitutional fashion, his claim must fail as a matter of law.

IX.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT IX OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F211. Applicant claims in his ninth ground for relief that the cumulative effect of his alleged constitutional violations, even if they could be considered harmless, in the aggregate state an independent constitutional violation.

C57. Applicant's claim of cumulative error fails to state a constitutional violation under either the federal Constitution or the state Constitution.

C58. Assuming *arguendo* that Applicant has identified an independent constitutional claim based on cumulative error, Applicant has failed to establish any constitutional errors occurred that can be accumulated, and, therefore, this claim must fail. *See Derden v. McNeel*, 938 F.2d 605, 608 (5th Cir.) (recognizing claims of constitutional error *only* of claims shown to be of merit), *rehearing granted*, 947 F.2d 147 (1991); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (rejecting claim of constitutional error due to failure to demonstrate any errors; "[t]wenty times zero equals zero").

ORDER

THE CLERK IS ORDERED to immediately transmit to the Court of Criminal Appeals, in accordance with Article 11.071, certified copies of the following documents:

A. Applicant Johnny Paul Penry's's Petition for a Post-Conviction Writ of Habeas Corpus and Supplement to Count I of Applicant Johnny Paul Penry's's Petition for a Post-Conviction Writ of Habeas Corpus (including all exhibits and attachments to these pleadings);

B. The State's Answer (including all exhibits and attachments to these pleadings);

C. All motions and responsive pleadings filed in this habeas corpus action;

D. All interrogatory responses filed by the parties;

E. The Court reporter's transcript and statement of facts from the motions hearing held on June 18, 1997 and the evidentiary hearing held on July 3, 1997;

F. The transcript of the deposition of Santiago Caberto held on July 14, 1997;

G. The documentary exhibits entered at the hearings and deposition;

H. The parties proposed findings of fact and conclusions of law; and

I. The Court's Findings of Fact, Conclusions of Law and Order;

THE CLERK IS FURTHER ORDERED to transmit to counsel for Applicant certified copies of the following documents, in accordance with Article 11.071:

A. All orders entered by this Court in this habeas corpus action;

B. The parties proposed findings of fact and conclusions of law; and

C. The Court's Findings of Fact, Conclusions of Law and Order.

Signed on this 23 day of Sept., 1997

/s/ Joe Ned Dean
JOE NED DEAN
258th DISTRICT COURT
STATE OF TEXAS

TEXAS COURT OF CRIMINAL APPEALS

EX PARTE JOHN PAUL PENRY — Habeas Corpus Application

NO. 15,918-02 — from POLK County

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, V.A.C.C.P.

On July 17, 1990, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, V.A.C.C.P., and the trial court, accordingly, set punishment at death. Applicant's conviction was affirmed on direct appeal to this Court. Penry v. State, 903 S.W.2d 715 (Tex.Cr.App.), *cert. denied*, ___U.S.___, 116 S.Ct. 480, 133 L.Ed.2d 408 (1995).

In the instant case, applicant presents ten allegations in which he challenges the validity of his conviction and resulting sentence. The trial court held an evidentiary hearing, entered findings of fact and conclusions of law, and recommended that the relief sought be denied.

This Court has reviewed the record. The trial court's findings of fact and conclusions of law are supported by the record and, upon such basis, the relief sought is denied.

IT IS SO ORDERED THIS THE 3RD DAY OF DECEMBER, 1997.

PER CURIAM

En banc

Do Not Publish

BAIRD and OVERSTREET, JJ., dissent to the decision to deny and would file and set the first allegation for submission.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHNNY PAUL PENRY, Petitioner,	§	
VS.	§	CIVIL ACTION
GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	§	NO. H-97-4094

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MEMORANDUM AND ORDER

Petitioner, Johnny Paul Penry, seeks a federal writ of habeas corpus under 28 U.S.C. § 2254 vacating his state capital murder conviction and death sentence. (Docket Entry No. 18). Respondent, Gary L. Johnson, Director, Texas Department of Criminal Justice – Institutional Division, has answered and moved for summary judgment. (Docket Entry No. 20). Penry has replied to respondent's motion for summary judgment; moved to strike respondent's motion for summary judgment; and cross-moved for summary judgment on several of his claims for relief. (Docket Entry Nos. 27 and 28).

Based on a careful review of the petition, the motions, the reply, the state court records, and the applicable law, this court GRANTS respondent's motion for summary judgment; DENIES Penry's motion to strike

respondent's motion for summary judgment; and DENIES Penry's cross-motion for summary judgment. Based on these rulings, this court lifts the stay of execution, denies the petition for writ of habeas corpus, addresses the issuance of a certificate of appealability, and dismisses this case.

The reasons for these rulings are set out in detail below.

I. Procedural History

On November 7, 1979, the State of Texas indicted Penry for the capital murder of Pamela Carpenter. (Trans. Vol. 1, p. 1).[1] In 1980, after a transfer of venue on defendant's motion, and following a competency hearing, a jury tried Penry, convicted him of capital murder, and sentenced him to death. The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence on direct appeal. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied sub nom., Penry v. Texas*, 106 S. Ct. 834 (1986). The Court of Criminal Appeals denied Penry's

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[1] The state court records of Penry's 1990 retrial consist of a five-volume transcript of pretrial motions, court orders, and other pleadings, cited as "Trans. Vol. ___, p. ___"; a fifty-two volume Statement of Facts, including hearings on pretrial motions, the suppression hearing, the competency hearing, the change of venue hearing, jury voir dire, the guilt/innocence proceedings, the sentencing proceedings, and the hearing on Penry's motion for new trial, cited as "S.F. Vol. ___, p. ___" and a four-volume transcript of the state habeas proceedings, cited as "S.H. Vol ___, p. ___." The parties have also submitted the Statement of Facts from Penry's 1980 suppression hearing and his 1980 trial.

application for state habeas relief on May 5, 1986. The Eastern District of Texas and the Fifth Circuit denied Penry's federal petition for a writ of habeas corpus. *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987).

In 1989, the United States Supreme Court granted Penry's petition for habeas relief, ruling that the jury instructions in the sentencing phase of his trial did not allow the jury to consider and give effect to the mitigating evidence of Penry's mental retardation and history of childhood abuse. *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) ("*Penry* I"). The Supreme Court held that the sentencing instructions deprived the jury of a "vehicle for expressing its 'reasoned moral response' " to the mitigating evidence Penry presented. *Id.* at 2952. Concluding that the sentence imposed did not result from the individualized determination required by "the fundamental respect for humanity underlying the Eighth Amendment," the Supreme Court vacated the conviction and sentence and remanded the case. *Id.* at 2945 (quoting *Woodson v. North Carolina*, 96 S. Ct. 2978, 2991 (1976)).

After a second competency hearing, the State of Texas retried Penry for capital murder ("*Penry* II").[2] The jury found Penry guilty of capital murder on July 9, 1990, and sentenced him to death on July 17, 1990. The Texas

[2] The case was remanded to Trinity County, Texas, the location of Penry's first trial. The trial judge changed venue to Polk County, Texas, where Penry's indictment had issued. The trial court granted Penry's motion for a change from that venue, moving the trial to Walker County, Texas, but denied a subsequent motion to change venue. Penry's second trial took place in Walker County.

Court of Criminal Appeals affirmed Penry's conviction and sentence on direct appeal. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App.), *cert. denied sub nom., Penry v. Texas*, 116 S. Ct. 480 (1995). On October 17, 1996, Penry filed an application for state habeas relief. On July 3, 1997, the state district court held an evidentiary hearing on three of Penry's claims. On September 23, 1997, the state district court denied Penry's habeas application. On December 3, 1997, the Texas Court of Criminal Appeals denied the habeas application, adopting the district court's recommendation.

On December 9, 1997, the state district court scheduled Penry's execution for May 13, 1998. On March 2, 1998, Penry filed a federal petition for writ of habeas corpus in this court. Penry asserts the following claims for relief:

I. The trial court failed to give the jury a vehicle for considering mitigating evidence concerning Penry's childhood abuse and mental retardation.

II. Penry's execution would violate his right to be free from cruel and unusual punishment because Penry is mentally retarded.

III. Penry's execution would violate the Eighth Amendment because there currently exists a national consensus against the execution of the mentally retarded.

IV. The trial court violated *Simmons v. South Carolina* by refusing to admit Penry's evidence regarding the unlikelihood of parole yet permitting the prosecutor to argue Penry's future dangerousness.

V. The trial court violated Penry's rights under *Estelle v. Smith* by admitting evidence derived from involuntary psychiatric examinations.

VI. The trial court violated Penry's constitutional rights by excluding evidence of Penry's mother's mental illness.

VII. The State violated Penry's constitutional rights by failing to administer his antipsychotic medication during the competency hearing and by failing to correct inaccurate testimony regarding the nature and purpose of the medication.

VIII. Penry's execution after eighteen years on death row would violate his constitutional rights under the Eighth Amendment.

IX. Penry's *Miranda* rights were violated, rendering his confessions illegal and improperly admitted at trial.

X. The trial court violated Penry's rights under the Sixth and Fourteenth Amendments by refusing to change venue from Walker County.

XI. Penry's constitutional rights were violated by the prosecution's misstatement of the law during voir dire.

XII. The trial court's jury charge during the punishment stage violated Penry's constitutional rights.

XIII. Penry's competency hearing was constitutionally inadequate.

XIV. The trial court's admission of irrelevant hearsay evidence violated Penry's Fifth and Sixth Amendment rights.

XV. Texas's clemency procedures violate Penry's substantive and due process rights under the Fourteenth Amendment and, therefore, violate Penry's rights under the Eighth Amendment.

On April 20, 1998, this court granted Penry's motion for a stay of his execution for the limited purpose of permitting full consideration of Penry's claims. Each of Penry's claims is addressed below.

II. Factual Background: The Record of *Penry* I and *Penry* II

On October 25, 1979, Pamela Carpenter telephoned a friend, Cynthia Peters, and told her friend that she had been raped and stabbed.[3] Peters drove to Carpenter's house in Livingston, Texas and found Carpenter, still alive, lying on a bed in her bedroom. Peters called the police.

Officer E.G. Paige of the Livingston Police Department arrived at Carpenter's house and talked to her. Carpenter did not know the identity of her attacker, but gave a description of a white male with black, curly hair, cut over the ears; slender and short; wearing a "reddish plaid shirt" with a "flowery design" and blue jeans. (S.F.

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[3] The factual background, largely undisputed, is drawn from the prosecution's case-in-chief during the guilt/innocence phase of *Penry* II.

Vol. 42, p. 174). Officer Paige noticed a pair of scissors and a pocketknife on the floor in front of Carpenter's bed.

Carpenter was taken to the hospital, where she again described the attacker in similar terms. Carpenter also stated that she did not know the attacker personally but had "seen him in the area." (S.F. Vol. 43, p. 264). Carpenter died at the hospital a short time later.

Billy Ray Nelson, a Polk County deputy sheriff, had heard a police radio report of the attack and a description of the attacker. Nelson thought the description matched Penry, whom he knew. Nelson drove to Penry's father's house in Livingston, Texas. Penry answered the door, wearing blue jeans without a shirt. Nelson told Penry briefly about the attack on Carpenter and asked Penry to come with him to the police station. Penry put on a shirt and Nelson drove him to the Livingston police station in the police car.

When Penry got out of the car at the station, Nelson and another officer in the car noticed blood soaking through the back of Penry's shirt. The officers asked Penry about the blood. Penry took off his shirt and showed the officers two puncture wounds below his right shoulder. Penry told the officers that he had received the wounds that morning when he had fallen off his bicycle and landed on a stick. Penry's shirt did not have holes in it, but Penry told the officers that the shirt he had been wearing when he was injured was at his father's house.

The officers obtained Penry's consent to search his father's house for the shirt and drove Penry back to the house. Penry entered the house, located the shirt, and

gave it and an undershirt to the officers. The shirt and undershirt were later determined to be torn in the location corresponding to Penry's puncture wounds. Both shirts had a blood stain around the tear.

The officers asked Penry to accompany them to the Carpenter home. Penry agreed. At the Carpenter home, Penry remained in Nelson's patrol car. While waiting in the patrol car, and not in response to any question, Penry told Nelson three times that he did not commit the crime. After they had been at the Carpenter home for approximately forty-five minutes, Penry told Nelson "that he wanted to get it off of his conscience." (S.F. Vol 43, p. 303). Nelson, believing Penry was to going to reiterate his innocence, told Penry to "be quiet." (*Id.*) Penry then said that he had "done it." (*Id.*, p. 304).

The officers brought Penry into the Carpenter home. Penry "point[ed] out things" before they reached the house and told Nelson "about the door that he had entered." (*Id.*, p. 305). Inside the house, Penry "explained everything in detail." (*Id.*, p. 306).

The officers drove Penry back to the Livingston police station. Penry was taken before Justice of the Peace Garnet Galloway, who read Penry his magistrate warnings, which are similar to *Miranda* warnings. Before Penry signed the warnings, Penry's father entered the courtroom and read Penry his *Miranda* rights. (1980 S.F. Vol. 4, pp. 184, 204-07). Penry's father then asked Penry if he had committed the crime. Penry answered "yes."

Penry gave a written confession that afternoon and a second written confession the next day, both in narrative form. In the confessions, Penry stated that he had first

met Carpenter three weeks earlier when he had helped "a guy named Harold" move some heavy appliances into Carpenter's home. Penry stated that he returned to Carpenter's home on October 25th, entered the house, and threatened Carpenter with his pocketknife. Carpenter fought with Penry, knocking the pocketknife out of Penry's hand and stabbing Penry in the back with a pair of scissors. Penry described subduing Carpenter, kicking and "stomping her," raping her, and stabbing her with the scissors. (1990 Jury Trial; State's Exhibit No. 48-A, p. 3). Penry then returned to his father's house.

At the trial, the State presented testimony from Harold Stubblefield. On October 9, 1979, Stubblefield had hired Penry to help install a freezer and stove in Carpenter's home. Stubblefield testified that Carpenter was present when he and Penry installed the appliances. The State also presented testimony from a forensic pathologist that the puncture wounds in Penry's back were consistent with wounds that could have been caused by the scissors found in Carpenter's home. The forensic pathologist also testified that a large bruise on Carpenter's chest was consistent with an injury that could have been caused by a pair of boots obtained from Penry.

In his defense, Penry presented medical records documenting his mental retardation,[4] possible organic brain

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[4] In *Penry* I, the Supreme Court described the mitigating evidence of mental retardation that Penry had presented to the jury during the sentencing phase of his first trial. The Court noted the evidence of mental retardation:

damage, and evidence he described as showing his desire to please authority figures. Penry also presented testimony from one of the officers that picked up Penry at his father's house on October 25, 1979. That officer testified that Penry put on shoes, rather than boots, when they left to go to the police station. Penry concluded with the testimony of Dr. Roberto Bayardo, a forensic pathologist. Dr. Bayardo testified that Penry's boots were unlikely to have caused the bruise on Carpenter's chest.

The State offered Dr. Fred Fason as a rebuttal witness. Dr. Fason testified that Penry had an antisocial personality, a factor that could lower the scores Penry obtained on IQ tests. Dr. Fason testified that such a personality would cause Penry to rebel against, rather than submit to, authority. Dr. Fason testified that he believed

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- As a child, Penry was diagnosed as having organic brain damage.
- Penry scored between 50 and 63 on IQ tests taken at different times, indicating "mild" or "moderate" mental retardation.
- Penry was evaluated as having the "mental age" of a 6-1/2 year old.
- Penry's "social maturity" was that of a 9 or 10 year old.
- Penry's mother, Shirley Penry, testified that Penry "was unable to learn in school and never finished the first grade."
- Penry was "in and out of a number of state schools and hospitals" until he was twelve years old, when he stopped attending school.
- Penry's aunt "struggled for over a year to teach Penry how to print his name."

Penry I, 109 S. Ct. at 2941-42.

Penry did not have significant brain damage or mental retardation; Penry possessed the intellectual capacity to understand *Miranda* warnings and to waive those warnings in a knowing and intelligent manner; and Penry had the capacity to act intentionally.

During the sentencing phase of the retrial, the prosecution offered testimony from five prison guards and a deputy sheriff that Penry demonstrated aggressive and dangerous behavior in prison and while in custody during his first trial in 1980. The prosecution also offered testimony from Maurice Cook, the Texas Ranger who took Penry's second confession; from a woman mentioned in Penry's second confession as someone he had wanted to rape; and from a woman Penry was convicted of raping in 1977.

Penry presented Dr. Randall Price, a clinical neuropsychologist, who testified that he believed Penry suffered from organic brain impairment and mental retardation. Dr. Price testified that organic brain impairment can reduce the ability to control behavior and impulses. One of Penry's childhood teachers testified that Penry was retarded and did not fake his retardation. Penry also presented additional medical records regarding his brain damage, mental retardation, and behavioral problems throughout his childhood and adolescence.

Several of Penry's relatives and childhood neighbors testified to Penry's childhood abuse. This evidence included testimony by Penry's sisters, Belinda Anderson and Trudy Ross; Penry's aunts, Lucille Anderson, Marilyn Barnet, and Patsy Ross; and Penry's neighbors,

Carolyn Ward and Billie Johnson. The jury heard the following testimony:

- When Penry was ten months old, Penry's mother, Shirley Penry, "sock[ed]" Penry "right in the mouth" when he was sitting in his highchair. (1990 S.F. Vol. 48, p. 1165).

- When Penry was older, Shirley Penry beat her son almost every day, using belt buckles, belts, brooms, toy brooms, sticks, mop sticks, switches, and her fists. Shirley Penry would "stomp on" Penry, try to "claw[ ]" Penry, threaten to "scratch his little eyeballs out," hit Penry in the head with a shoe, put cigarettes out on Penry's skin, hold Penry's head under water, and make Penry stand in front of a heater until his legs blistered. (*Id.*, pp. 1086, 1088, 1113-15, 1264). When Penry was four years old, Shirley Penry placed him in boiling water that caused scarring from his waist down. (*Id.*, pp. 1125, 1261-62). Shirley Penry "[stood] there" as Penry screamed. (*Id.*, p. 1125).

- Shirley Penry would lock Penry in his room for up to twelve to fourteen hours without food or water, and sometimes for days at a time. (*Id.*, pp. 1083, 1116). When Penry was forced to defecate in his room or the attic, Shirley Penry would beat him. (*Id.*, pp. 1262-63, 1271). On occasion, Shirley Penry forced Penry to drink his own urine and to eat his own feces. (*Id.*, pp. 1089-91, 1115-16).

- Neighbors heard "terrified screams, pleading screams" coming from the Penry household. (*Id.*, p. 1249).

- Shirley Penry verbally abused Penry, making comments such as "I ought to just drowned you, you little bastard" and calling him "short little bastard" and "mother-fucker." On one occasion, Shirley Penry grabbed a knife and threatened to cut off Penry's penis. (*Id.*, pp. 1085-86, 1088, 1118).

The prosecution offered Dr. Walter Quijano and Dr. Stanton Samenow as: rebuttal witnesses. Dr. Quijano testified that he did not believe that Penry was mentally retarded, had brain damage, or lacked the capacity to control his impulses. Dr. Quijano and Dr. Samenow both testified that Penry had an antisocial personality and would be a danger in the future. Dr. Samenow testified that Penry could control himself and could act deliberately.

Based on this evidence and the court's instructions, the jury found Penry guilty of capital murder and sentenced him to death. In this habeas petition, Penry challenges some of the evidence presented, some of the evidence excluded, and the court's instructions.

III. The Applicable Legal Standards

A. The Antiterrorism and Effective Death Penalty Act

Penry filed this habeas petition on March 2, 1998; the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs. *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997); *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1845 (1998); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997). The AEDPA provides

that a federal habeas petition shall not be granted with respect to any claim adjudicated on the merits in state court[5] unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d)(1)-(2). The AEDPA further provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

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[5] In *Nobles*, the court noted that before applying the AEDPA standards, the court must determine whether the petitioner's claim was adjudicated on the merits in state court proceedings. *Nobles*, 127 F.3d at 416. Penry does not contend that his claims were not adjudicated on the merits in state court. In *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *overruled on other grounds by Lindh*, 117 S. Ct. at 2059, the Fifth Circuit held that a claim is adjudicated on the merits if, as here, the state court in post-conviction proceedings has entered findings of fact and/or conclusions of law on the issue.

Section 2254(d) establishes different standards of review for questions of fact, questions of law, and mixed questions of law and fact. Federal courts reviewing factual determinations may grant relief only if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence." *Drinkard v. Johnson*, 97 F.3d 751, 767 (5th Cir. 1996) (quoting 28 U.S.C. § 2254(d)(2)), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled on other grounds by Lindh*, 117 S. Ct. at 2059. In reviewing a question of law, a federal court may grant habeas relief only if it determines that a state court's decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court." *Id.* at 768 (quoting 28 U.S.C. § 2254(d)(1)). In reviewing a mixed question of law and fact, "a federal court may grant habeas relief only if it determines that the state court decision rested on 'an unreasonable application of [ ] clearly established Federal law, as determined by the Supreme Court' to the facts of the case." *Id.* at 767-68 (quoting 28 U.S.C. § 2254(d)(1)) (alteration in original); *see also Nobles*, 127 F.3d at 416.

The "unreasonable application" standard requires more than a simple disagreement with a state court decision. *Drinkard*, 97 F.3d at 768. An application of law to facts is "unreasonable 'only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect.' " *Jones v. Jones*, 163 F.3d 285, 303 (5th Cir. 1998) (citing *Cain*, 125 F.3d at 277). A state court decision will not be reversed if the decision is a reasonable, good faith application of Supreme Court precedent. *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds*, 105

F.3d 209 (5th Cir. 1997). A review of mixed questions of law and fact is "most closely akin to the traditional 'clearly erroneous' standard." *Id.* at 1267.

B. Procedural Default and Procedural Bar

"A procedural default . . . occurs when a prisoner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.' " *Nobles*, 127 F.3d at 420 (quoting *Coleman v. Thompson*, 111 S. Ct. 2546, 2557 n.1 (1991)). To exhaust state remedies, a habeas petitioner "must have provided the state courts with a 'fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.' " *Id.* (quoting *Anderson v. Harless*, 103 S. Ct. 276, 277 (1982)); *see also Shute v. Texas*, 117 F.3d 233, 237 (5th Cir. 1997) ("To exhaust available state remedies, a habeas petitioner 'must fairly apprise the highest court of his state of the federal rights which were allegedly violated.' " (quoting *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993))).

Texas courts considering unexhausted claims on a successive habeas petition would find them procedurally barred. Article 11.071 § 5(a) of the Texas Code of Criminal Procedure prohibits a Texas court from considering a successive habeas petition on the merits unless the petition satisfies one of the exceptions set forth in § 5(a)(1),

(2), or (3).[6] The Texas Court of Criminal Appeals has applied article 11.071 to bar the presentation of new issues in successive petitions when the claimant's original petition was filed before the statute's effective date of September 1995. *Ex parte Davis*, 947 S.W.2d 216,221 (Tex. Crim. App. 1996) (en banc). The Fifth Circuit has held that article 11.071 is an adequate state procedural bar, finding that the rule is strictly and regularly enforced. *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998). The

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[6] Article 11.071 § 5(a) provides:

(a) If an initial application for a writ of habeas corpus is untimely or if a subsequent application is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent or untimely initial application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable: (A) on the date the applicant filed the previous application; or (B) if the applicant did not file an initial application, on or before the last date for the timely filing of an initial application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Texas abuse of the writ doctrine is also an adequate state procedural bar for the purpose of federal habeas review. *Nobles*, 127 F.3d at 423; *see also Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995).

In addition to the exhaustion issue, claims for federal habeas relief are procedurally barred if they were defaulted in the state court proceedings. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 111 S. Ct. at 2565; *see also Muniz*, 132 F.3d at 220.

" 'In order to prove a fundamental miscarriage of justice, the prisoner must assert his actual innocence.' " *Muniz*, 132 F.3d at 221 n.12 (quoting *Glover v. Cain*, 128 F.3d 900, 904 (5th Cir. 1997)); *see also Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998). In *Sawyer v. Whitley*, the Supreme Court held that a petitioner attempting to assert a procedurally defaulted challenge to his death sentence may overcome the default by showing that he is " 'actually innocent' of the death penalty." 112 S. Ct. 2514, 2517 (1992). The petitioner must "show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty." *Id.* at 2525.

The *Sawyer* actual innocence exception is limited to factual innocence. *See Callins v. Johnson*, 89 F.3d 210, 215

(5th Cir. 1996); *Fearance*, 56 F.3d at 637-38. In *Callins*, the Fifth Circuit held that even if a mentally retarded person was constitutionally ineligible for the death penalty, that individual is not "actually innocent" under *Sawyer*. 89 F.3d at 215. Penry's argument that he may assert procedurally defaulted claims because he is mentally retarded and, therefore, "actually innocent" of the death penalty, is barred by Fifth Circuit precedent.

Each of Penry's claims is examined under the AEDPA.

IV. The Jury Instructions on Mitigating Evidence (Claim I)

At the close of the sentencing phase of Penry's 1980 trial, the jury imposed the death penalty by unanimously answering "yes" to the three "special issues" set out in the Texas Code of Criminal Procedure at article 37.071(b). The Supreme Court in *Penry* I determined that none of the three "special issues" clearly provided a means for the jury to give effect to Penry's mitigating evidence. *Penry*, 109 S. Ct. at 2949. The Supreme Court stated:

> [I]n the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.

Id. at 2952.

At the conclusion of the sentencing phase of the 1990 trial, the court again submitted the same Texas statutory special issues that the jury had answered in *Penry* I:

> Special Issue No. 1
>
> Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Special Issue No. 2
>
> Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Special Issue No. 3
>
> Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(Trans. Vol. 5, pp. 1330-31).

Unlike *Penry* I, however, the trial court on retrial also gave the following instructions:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall

sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

(Trans. Vol. 5, p. 1329).

Penry argues that even with the added instructions, the special issues did not allow the jury to consider Penry's retardation and childhood abuse in deciding

whether to answer "yes" or "no." Penry contends that if the jurors wished to give effect to the mitigating evidence, the trial court's instruction forced them to lie when answering the special issues and to violate their oaths to answer the special issues truthfully. Penry argues that the mitigating evidence instruction was merely a ' "nullification instruction" that did not cure the *Penry* I constitutional error.

The Texas Court of Criminal Appeals, on Penry's direct appeal, considered and rejected this claim, holding that the "nullification instruction . . . is sufficient to meet the constitutional requirements of *Penry v. Lynaugh.*" *Penry*, 903 S.W.2d at 765. Whether a jury instruction placed relevant mitigating evidence beyond the reach of the jurors is a mixed question of law and fact. *Drinkard*, 97 F.3d at 768-69. In this case, the state court's ruling is not an unreasonable application of clearly established federal law.

In *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), the Supreme Court articulated the standard for determining whether jury instructions adequately permit a jury to consider and give effect to mitigating evidence: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 761 (quoting *Boyde v. California*, 110 S. Ct. 1190, 1198 (1990)). A court addresses this issue by considering "the entire context in which the instructions were given." *Buchanan*, 118 S. Ct. at 762; *see also Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993). "In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions

in the same way that the jury would – with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.' " *Johnson v. Texas*, 113 S. Ct. at 2669 (quoting *Boyde*, 110 S. Ct. at 1198). "A *Penry* claim does not arise when constitutionally relevant evidence 'can be given mitigating effect *in some way* under the Texas special issues.' " *Davis v. Scott*, 51 F.3d 457, 464 (5th Cir. 1995) (quoting *Motley v. Collins*, 18 F.3d 1223, 1234 (5th Cir. 1994)) (emphasis in original).

Both the Supreme Court and the Fifth Circuit have held that jury arguments explaining how mitigating evidence can or should be considered in sentencing affect whether the jury was reasonably likely to have applied the instructions to prevent consideration of relevant mitigating evidence. *See Buchanan*, 118 S. Ct. at 762-63; *Drinkard*, 97 F.3d at 761 n.16. The Supreme Court has also noted that a defendant's presentation of extensive mitigating evidence is likely to convey to the jury that they may take the evidence into account in sentencing. *See Johnson v. Texas*, 113 S. Ct. at 368; *Boyde*, 110 S. Ct. at 1199-1200.

The record of Penry's 1990 trial supports the state appellate court's conclusion that the jury was able to give constitutionally sufficient consideration to Penry's mitigating evidence. During the voir dire examination of the venire in the 1990 trial, the prosecutor told the venire that they could answer one of the special issues "no" if they felt that Penry's mitigating evidence warranted a life sentence:

> Another area, in fact, that a jury can take into consideration is what we refer to loosely sometimes as mitigating evidence. There is not a separate question on mitigating evidence, but you

> will probably receive some sort of an instruction from the Judge, concerning mitigating evidence. . . . [F]urthermore, if you feel like that [mitigating] evidence is strong enough that you feel like it would even warrant a lesser sentence than death, that it would warrant a life sentence instead of death, then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty.

(S.F. Vol. 15, pp. 186-87).

During closing argument in the sentencing phase, defense counsel emphasized this point:

> You are going to get just three yes or no questions. You are not going to get any questions about mitigating circumstances. Three questions called Special Issues, and none of them say anything about mentally retarded, none of them say anything about child abuse, but, the Judge told you, he told you that when you answer those questions you are to give affect [sic] and consideration to mitigating circumstances. If you determine, when giving affect [sic] to the mitigating evidence, if any, that a life sentence is reflected by a negative finding of the issue under consideration, rather than the death sentence, appropriate response to the personal culpability of the Defendant, then, a negative finding should be given to one of the Special Issues.

(S.F. Vol. 51, pp. 1902-03). Defense counsel then explicitly told the jury that they were able to answer "no" to one of the special issues despite the fact that a "no" answer was not the "literally correct" answer:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all of this time with you to make sure that you understand what it says. If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere.

(*Id.*, p. 1903).

The court's instruction on the effect of mitigating evidence tracked *Penry* I by "informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty." The instruction went further, informing the jurors that they should answer one of the special questions "no" if they believed that Penry's personal culpability warranted a life sentence instead of death. Both the prosecutor and defense counsel told the jurors that they were able to answer one of the special issues "no" if they believed Penry's mitigating evidence warranted a life sentence, even if that answer was not "literally correct."

The Fifth Circuit recently approved a mitigating evidence instruction very similar to the instruction given to Penry's jury. In *Emery v. Johnson*, 139 F.3d 191 (5th Cir.

1997), the petitioner was sentenced to death under the version of the Texas Code of Criminal Procedure article 37.071 used in Penry's trial and retrial. The trial court in *Emery* gave an instruction which was virtually identical to that given by the trial court at Penry's retrial. The Fifth Circuit upheld the instruction against the petitioner's *Penry* challenge, stating:

> This instruction allowed the jury to consider any appropriate mitigating circumstance, including a history of child abuse, and required the jury not to sentence Emery to death if a life sentence was appropriate in light of his moral culpability. The instruction adequately addressed the Court's concerns about Texas's death penalty scheme by giving the jury the ability to consider any appropriate mitigating circumstance.

Id. at 200. The Fifth Circuit's ruling in *Emery* supports the state court's conclusion as to Penry's first claim.

The state appellate court's conclusion that the trial court's instructions on mitigating evidence were constitutional is consistent with, and not an unreasonable application of, clearly established federal law. This court DENIES Penry's claim that the trial court's instructions did not permit the jury to consider and give effect to his mitigating evidence of mental retardation and childhood abuse.

V. The Eighth Amendment and an Emerging National Consensus (Claims II and III)

In *Penry* I, Penry argued that the execution of a mentally retarded person "like himself with a reasoning

capacity of approximately a 7-year-old would be cruel and unusual [punishment] because it is disproportionate to his degree of personal culpability." *Penry* I, 109 S. Ct. at 2956. The Supreme Court rejected this argument, holding that sentencing juries are able to evaluate sufficiently whether the extent of a particular defendant's mental retardation reduces his culpability to justify declining to impose a death sentence.

In *Penry* I, Penry also argued that "there is objective evidence . . . of an emerging national consensus against execution of the mentally retarded, reflecting the 'evolving standards of decency that mark the progress of a maturing society.' " *Id.* at 2955 (quoting *Trop v. Dulles*, 78 S. Ct. 590, 598 (1958)). The Supreme Court rejected this argument, finding insufficient evidence of a national consensus against execution of the mentally retarded to make it unconstitutional. *Id.* The Court held that the execution of a mentally retarded person would not violate the Eighth Amendment as long as the sentencing jury could consider and give effect to the nature and extent of the defendant's mental retardation in each case. *Id.* at 2958.

In his present petition, Penry again argues that the execution of a mentally retarded person violates the Eighth Amendment. Penry argues that since *Penry* I, a national consensus against execution of the mentally retarded has developed. Penry argues that this emerging national consensus against execution of the mentally retarded also "establishes a societal consensus against . . . the execution of persons exhibiting a certain level of mental retardation." Penry relies on new evidence, not presented in *Penry* I, to argue that current community views prohibit the execution of all mentally retarded

persons. Penry also relies on this new evidence to argue that the execution of an individual with his level of mental retardation is constitutionally prohibited.

This court considers both of Penry's arguments below.

A. The "Categorical" Challenge to the Death Sentence (Claim III)

Respondent argues that Penry's claim that the Eighth Amendment categorically prohibits execution of mentally retarded individuals is procedurally barred because, although Penry argued in state court that his execution would be unconstitutional because of *his* level of intelligence and background, he did not argue that execution of *any* mentally retarded person was categorically prohibited. Penry's direct appeal to the Court of Criminal Appeals did not contain an argument that "evolving standards of decency" categorically prohibit execution of any mentally retarded person. In his direct appeal, Penry did not cite or rely upon evidence of an evolving national standard forbidding execution of any mentally retarded individual. In contrast, Penry explicitly relies upon such evidence to support both of his arguments before this court. Penry also failed to raise this claim in his state habeas application. (Petition for a Post-Conviction Writ of Habeas Corpus, *Ex parte Penry*, Cause No. 15,977-C).

Penry did not give the Texas Court of Criminal Appeals " 'a fair opportunity' to apply controlling legal principles to the facts bearing upon his . . . claim" that the

Eighth Amendment categorically bars execution of the mentally retarded. The claim is procedurally barred.[7]

Even if the claim was not procedurally barred, this court would reject the claim on its merits. Penry argues that there is sufficient objective evidence of a national consensus against execution of mentally retarded persons to enable a court to find that permitting the State of Texas to execute Penry would violate the "evolving standards of decency" that the Eighth Amendment protects. Penry has a "heavy burden" to show the national consensus he asserts. *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977 (1989) (quoting *Gregg v. Georgia*, 96 S. Ct. 2909, 2926 (1976)).

In considering this argument in *Penry* I, the Supreme Court required an "objective indicator of contemporary values upon which we can rely," such as the "judgment of legislatures and juries." *Penry* I, 109 S. Ct. at 2955-56. The *Penry* I Supreme Court considered the following evidence:

- a federal criminal statute, the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l) (1988), prohibiting the execution of a mentally retarded person;

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[7] This court does not find Penry's claim to be barred by the law of the case doctrine. Penry's evidence of national opposition to the execution of the mentally retarded arose after *Penry* I and demonstrates more extensive opposition to execution of the mentally retarded than was shown in *Penry* I. *See Society of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 735 (5th Cir. 1997) (noting that the law of the case doctrine does not bar adjudication of a claim presented in a previous appeal if the "evidence in a subsequent trial was substantially different").

- one state, Georgia, banned the execution of a mentally retarded person;
- one state, Maryland, had enacted a statute banning the execution of a mentally retarded person to take effect on July 1, 1989;
- public opinion polls taken in Texas, Florida, and Georgia, showing public opposition to execution of the mentally retarded; and
- a resolution of the American Association on Mental Retardation opposing execution of the mentally retarded.

Id. at 2955.

The Supreme Court found that this evidence, combined with evidence that fourteen states did not allow the death penalty under any circumstances, was insufficient to show a national consensus against execution of the mentally retarded. *Id.* The Supreme Court found that public opinion polls expressing disapproval of the execution of mentally retarded persons and the opposition of the American Association on Mental Retardation were not sufficiently reliable indicators of a national consensus to allow the Court to find the execution of mentally retarded persons categorically prohibited by the Eighth Amendment. "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely." *Id.*

Penry now offers evidence that the federal government and twelve of the thirty-eight states that allow capital punishment specifically exempt the mentally

retarded from the death penalty. *See* Violent Crime Control and Law Enforcement Act, 18 U.S.C. § 3596(c); Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l); ARK. CODE ANN. § 5-4-618(b); COLO. REV. STAT. § 16-9-403; GA. CODE ANN. § 17-7-131(j)); IND. CODE ANN. § 35-36-9-6; KAN. STAT. ANN. § 21-4623(d); KY. REV. STAT. ANN. § 532.140; MD. ANN. CODE OF 1957, ART. 27 § 412(g); NEB. REV. STAT. ANN. § 28-105.01(2); N.M. STAT. ANN. § 31-20A-2.1 (B); N.Y. CRIM. PROC. LAW § 400.27(12); TENN. CODE ANN. § 39-13-203(b); WASH. REV. CODE ANN. § 10.95.030(2). Twelve additional states and the District of Columbia do not allow capital punishment under any circumstances.[8]

The Supreme Court has found the application of the death penalty to a particular class of persons inconsistent with "evolving standards of decency" in cases in which only a small number of states permitted the challenged

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[8] Penry also cites two states in which bills prohibiting execution of mentally retarded persons are pending in the state legislature. *See* H.B. 2544, 43rd Leg. (Ariz. 1998) and H.B. 1288, 89th Leg., 2d Reg. Sess. (Mo. 1998). Both bills were introduced on January 13, 1998. Though neither bill was enacted into statute, both states have similar bills pending in their 1999 legislative sessions. *See* H.B. 2539, 44th Leg. (Ariz. 1999); H.B. 425, 90th Leg., 1st Reg. Sess. (Mo. 1999). Several other states, including Texas, are considering similar bills in their 1999 legislative sessions. *See e.g.*, H.B. 2121, 76th Leg. (Tex. 1999); S.B. 180, 181st Leg. (Mass. 1999); H.F. 26, 78th Leg., 1st Sess. (Iowa 1999); S.B. 188, 74th Leg. (S.D. 1999).

Penry also cites two states that by statute allow capital punishment but have not executed any prisoners since the Supreme Court upheld the constitutionality of capital punishment *in Gregg v. Georgia*, 96 S. Ct. 2909, 2923 (1976), and do not have any prisoners currently on death row. Penry argues that these states have "implicitly rejected" capital punishment.

application of the death penalty. *See Ford v. Wainwright*, 106 S. Ct. 2595, 2601 (1986) (no states permitted execution of the legally insane); *Enmund v. Florida*, 102 S. Ct. 3368, 3374 (1982) (only eight states permitted capital punishment for participation in a robbery in which an accomplice kills a person); *Coker v. Georgia*, 97 S. Ct. 2861, 2867-68 (1977) (only one state permitted capital punishment for the crime of rape of an adult woman); *see also Thompson v. Oklahoma*, 108 S. Ct. 2687, 2695-96 (1988) (no state that set minimum age limits on imposition of the death penalty permitted the execution of those who committed capital murder at age fifteen or younger).

In cases in which the Court has found that imposing the death penalty on a particular category of persons did not offend evolving standards of decency, over half the states that permitted capital punishment allowed execution of that category of persons. In *Stanford*, the Supreme Court considered whether imposing the death sentence on a sixteen or seventeen year-old defendant violated the Eighth Amendment. The Court noted that "[o]f the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders." *Stanford*, 109 S. Ct. at 2975. The Court concluded that "a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above." *Id.* at 2976. The Court relied on this empirical result in finding that the Constitution did not forbid such punishment. In *Tison v. Arizona*, 107 S. Ct. 1676, 1686 (1987), the Court upheld Arizona's imposition of the death penalty for a defendant convicted of being a major participant in a felony with reckless indifference to human life, when eleven states

that permitted capital punishment forbade the challenged imposition of the death penalty.

The record before this court shows that twenty-six of the thirty-eight states that permit capital punishment allow execution of the mentally retarded.[9] Under the Supreme Court precedents, this level of acceptance in the state legislatures does not provide the objective support for Penry's argument necessary before a court may find a violation of the Eighth Amendment on the ground of an emerging national consensus.

Penry also submits evidence from polls finding that jurors are less likely to sentence a defendant to death if the defendant is mentally retarded and evidence that relatively few mentally retarded persons have been executed since 1976. This evidence does not show that jurors or prosecutors are categorically opposed to the execution of all mentally retarded persons. Rather, the evidence supports the ability of jurors to give effect to a particular

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[9] The *Stanford* Court explicitly rejected the argument that the number of states permitting the challenged application of the death penalty should be compared to the number of states overall, including those that do not allow the death penalty at all. *Stanford*, 109 S. Ct. at 2975-76 n.2. The Court also rejected the argument that the fact that the federal government has made a class of individuals ineligible for the death penalty is determinative of a national consensus. *See id.* at 2977 ("[E]ven if it were true that no federal statute permitted the execution of persons under 18, that would not remotely establish – in the face of a substantial number of state statutes to the contrary – a national consensus that such punishment is inhumane, and more than the absence of a federal lottery establishes a national consensus that lotteries are socially harmful.").

defendant's mental retardation as a mitigating circumstance in sentencing. *See Stanford*, 109 S. Ct. at 2977.

In *Penry* I, the Supreme Court rejected Penry's evidence of public opinion polls and statements from professional associations expressing opposition to execution of mentally retarded persons as insufficient to show a national consensus against the application of the death penalty to a particular class of persons. *Penry* I, 109 S. Ct. 2955. The evidence in *Penry* II portrays a growing disapproval of the execution of the mentally retarded. However, the Supreme Court has not held that evidence of a trend against a particular application of the death penalty is sufficient to enable a court to find that application "cruel and unusual." *See Stanford*, 109 S. Ct. at 2975-76 (requiring the petitioner to establish a "*degree* of national consensus . . . sufficient to label a particular punishment cruel and unusual" (emphasis added)); *id* at 2977 (stating that the petitioner has a " 'heavy burden' . . . to establish a national consensus" against an application of the death penalty); *id* (noting that the petitioner had not established a "settled consensus"); *Penry* I, 109 S. Ct. at 2955 (noting that although Penry's public opinion and professional association evidence may "ultimately find expression in legislation," the evidence had failed to establish a present "national consensus").

Penry's arguments and data do not respond to a fundamental problem the Supreme Court identified with the "categorically ineligible" approach Penry advances. In *Penry* I, the Supreme Court noted that a categorical prohibition against imposing a punishment against all retarded persons but permitting the same punishment for others had a troubling and dangerous consequence. The

Court noted that "[m]entally retarded persons are individuals whose abilities and experiences can vary greatly," *Penry* I, 109 S. Ct. at 2957, as can their ability to bear personal culpability for their actions. The Court recognized the difficulty, and danger, in reducing all mentally retarded individuals to a single category. Such a categorical approach could improperly limit hard-won opportunities for retarded persons to participate fully in events requiring legal recognition, such as marriage or making contracts. *Id.* at 2958. Penry does not address the difficulty inherent in his argument.

Penry's evidence is not sufficient to permit this court to find that there currently exists a "national consensus" against execution of mentally retarded persons, making such executions unconstitutional. Penry is not entitled to federal habeas relief on this claim, both because it is procedurally barred and on the merits. This court DENIES Penry's claim that the execution of any mentally retarded person violates the Eighth Amendment's prohibition of "cruel and unusual" punishment.

B. The Particularized Challenge to the Death Sentence (Claim II)

In his federal petition for habeas relief, Penry reiterates the argument he made on direct appeal in state court, that the degree and nature of his mental retardation and history of childhood abuse make him insufficiently culpable to permit his execution. Respondent asserts that the claim is barred by 28 U.S.C. § 2244(b)(1) as a successive petition because the Supreme Court considered and rejected it in *Penry* I.

Section 2244(b)(1) states: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." The AEDPA does not alter the pre-AEDPA definition of a " 'second or successive' petition." *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997). Circuits that have considered the issue have held that a claim in a habeas petition filed after a retrial and second conviction is not treated as presented in a "second" or "successive" petition if it attacks only the second conviction or sentence. *See, e.g., Esposito v. United States*, 135 F.3d 111, 113 (2d Cir. 1997); *Pratt v. United States*, 129 F.3d 54, 62 (1st Cir. 1997); *Palmer v. Clarke*, 961 F.2d 771, 774-75 (8th Cir. 1992). Penry's claim that the evidence of the nature and extent of his mental impairment presented in the 1990 retrial makes the death sentence he received unconstitutional is not barred by section 2244(b)(1).

Respondent alternatively argues that this court is barred from considering Penry's argument by the "law of the case" doctrine. The doctrine of the law of the case is inapplicable because additional evidence, not presented in his first trial, provides changed factual support for Penry's claim. *Society of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 735 (5th Cir. 1997). Penry's claim is not barred by the law of the case doctrine.

On Penry's direct appeal, the Texas Court of Criminal Appeals noted that the "Eighth Amendment does not preclude the execution of mentally retarded persons," citing *Penry* I. *Penry*, 903 S.W.2d at 766. The Texas appellate court stated further that there is no "authority stating that it is unconstitutional to execute persons who have

brain damage or were abused as children." *Id.* at 766-67. Again citing *Penry* I, the Texas court concluded that the Eighth Amendment was satisfied because Penry's sentencing jury had the "means to consider all of the evidence, including [Penry's] mitigating circumstances, and yet determined that death was the appropriate punishment." *Id.* at 767. The state court's decision on this mixed question of law and fact is not an unreasonable application of federal law as clearly established by the United States Supreme Court.

In his second trial, Penry presented Dr. Randall Price as a witness. Dr. Price drew an explicit link between what he believed to be Penry's organic brain damage and Penry's inability to control himself or use good judgment. (S.F. Vol. 48, pp. 1337-38). Penry also presented far more graphic and extensive evidence of the abuse he suffered as a child than had been presented in his first trial. Penry's new evidence of childhood abuse included evidence that he had suffered more frequent and more violent physical, mental, and psychological abuse than had been apparent from the evidence introduced in his first trial.

In *Penry* I, the Supreme Court held that the constitutional requirements are met when a jury is able to consider and give effect to mitigating evidence that may show that a particular defendant cannot be held culpable for his actions. *Penry* I, 109 S. Ct. at 2958. In Penry's second trial, the jury heard extensive mitigating evidence, argument, and instructions. The jury was able to consider whether Penry's mental retardation and his childhood abuse lessened Penry's culpability to a level at which the death penalty was not an "appropriate punishment."

This court finds that, considering the additional mitigating evidence Penry presented in his second trial, the Texas Court of Criminal Appeals' conclusion that the execution of someone with Penry's level of mental retardation and history of childhood abuse does not violate the Eighth Amendment was not an unreasonable application of federal law. This court DENIES Penry's request for habeas relief based on Claim II.

C. The Combination of Claims II and III

Penry characterizes Claim II as dependent on his new evidence of a national trend toward disapproval of execution of the mentally retarded. "[I]t may be possible that this objective evidence establishes a societal consensus against only the execution of persons exhibiting a certain level of mental retardation." (Docket Entry No. 28, p. 21). This argument is not barred by the law of the case doctrine because it is narrower than the categorical Eighth Amendment argument the Supreme Court considered in *Penry* I and because it relies on "substantially different" evidence. Because it attacks a second conviction, Penry's habeas petition is not governed by rules restricting the consideration of successive petitions. Penry's claim is not barred by 28 U.S.C. § 2244(b)(2), which forecloses consideration of a claim presented in a successive petition that was not presented in a prior petition, because the claim relies on evidence of an alleged national consensus developed since Penry's first habeas petition.

Penry did not, however, present this claim to the Texas courts on appeal or during the state habeas proceedings. Indeed, Penry did not articulate this argument

until his reply. Respondent did not have an opportunity to raise a procedural default bar to the argument. This court is not required to raise a procedural default *sua sponte*. *See Trest v. Cain*, 118 S. Ct. 478, 480 (1997) ("We are not aware of any precedent stating that a habeas court must raise [a procedural default] where the State itself does not do so."). While a district court may exercise its discretion to raise a procedural default *sua sponte*, *Magouirk v. Phillips*, 144 F.3d 348, 357 (5th Cir. 1998), this court concludes that it should not avoid the merits of Penry's "combination" claim by raising a procedural default bar.

This court finds that Penry's new evidence of the degree of his mental retardation and the effects of the childhood abuse he suffered, in combination with the previously available evidence, is not sufficient to raise a fact issue that a national consensus has developed, making it unconstitutional to execute such an individual. Penry's summary judgment evidence does not provide the objective support necessary to create a fact issue that a national consensus against the execution of a person with Penry's level and degree of mental capability has developed, requiring a finding of a constitutional violation. Summary judgment in favor of respondent on this claim is appropriate. *See, e.g, Goodwin v. Johnson*, 132 F.3d 162, 169 (5th Cir. 1997) (applying the Rule 56 summary judgment standard to a capital defendant's habeas petition).

This court DENIES Penry's claim that his execution violates the Eighth Amendment because there exists a national consensus against applying the death penalty to

an individual with Penry's level of mental retardation and background of abuse.

VI. The *Simmons* Claim (Claim IV)

In *Simmons v. South Carolina*, 114 S. Ct. 2187, 2190 (1994), the Supreme Court held that when a capital murder defendant would be ineligible for parole under state law if sentenced to life imprisonment, and the prosecution argues that the defendant would be dangerous in the future, due process requires the jury to be informed that the defendant would be ineligible for parole. The Fifth Circuit has rejected the extension of the *Simmons* rule to a Texas capital defendant. Under Texas law, a capital defendant is not legally ineligible for parole. In *Allridge v. Scott*, the Fifth Circuit held that *Simmons* applies only to situations in which the defendant is "legally ineligible" for parole.[10] 41 F.3d 213, 222 (5th Cir. 1994); *see also Boyd v.*

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[10] Penry argues that this court should not follow the *Allridge* line of cases in light of an opinion joined by four Justices of the Supreme Court dissenting from the denial of a petition for writ of *certiorari* in *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J., dissenting from the denial of petition for a writ of *certiorari*). In his opinion, Justice Stevens noted that there was an "obvious tension" between *Simmons* and the refusal by the State of Texas to allow a defendant to give the jury truthful information about his parole eligibility. *Id.* at 355. An opinion dissenting from the denial of a petition for writ of *certiorari* does not have precedential value. The Fifth Circuit cases on point, based on Supreme Court majority opinions, are binding on this court. *See Teague v. Lane*, 109 S. Ct. 1060, 1067-68 (1989). The Fifth Circuit has recognized, but specifically declined to apply, Justice Stevens' dissenting opinion in an opinion addressing a *Simmons* claim. *See Muniz*, 132 F.3d at 224 n.22 (citing Justice Stevens' dissenting opinion as "*but cf.*").

Johnson, No. 97-10823, 1999 WL 71660, at *5 (5th Cir. Feb. 12, 1999) (to be published in F. 3d.); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir. 1998); *Woods v. Johnson*, 75 F.3d 1017, 1037 (5th Cir. 1996); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995).

It is undisputed that Penry would have been legally eligible for parole had he been sentenced to life imprisonment. However, during the sentencing phase of the retrial, Penry offered into evidence his signed statement purporting "to give up [his] right to parole for the rest of [his] life." The trial court sustained the prosecutor's objection to the introduction of this statement and excluded Penry's statement from evidence. (S.F. Vol. 50, pp. 1600-02).

During the sentencing phase of the trial, the court instructed the jury not to consider the possibility of parole in determining Penry's sentence. (Trans. Vol. 5, p. 1328; S.F. Vol. 51, pp. 1915-16). In his closing argument, the prosecutor argued that Penry would be a future danger to society. (S.F. Vol. 51, pp. 1946-47). After closing arguments, immediately after the jury began to deliberate, Penry's counsel: objected to the prosecutor's future dangerousness argument and moved for a mistrial. (*Id.*, pp. 1948-49). The trial court overruled Penry's objection and denied his motion. (*Id.*, p. 1949).

Penry argues that the trial court erred by permitting the prosecutor to argue that Penry would be a future danger to society while denying Penry the opportunity to present evidence that parole was at least highly unlikely. Penry appears also to challenge the trial court's refusal to give Penry's requested jury instruction regarding parole.

On direct appeal, the Texas Court of Criminal Appeals rejected Penry's challenge to the jury instruction, noting that Penry's offer of "waiver of parole" was not legally binding. *Penry*, 903 S.W.2d at 763-64. The court rejected Penry's challenge to the prosecutor's argument as not properly preserved for review. *Id.* at 764.

A. The Prosecution's Argument

Penry procedurally defaulted on his claim that the prosecution's closing argument violated his rights. A procedural default in state court bars federal habeas review if the last state court rendering a judgment clearly and expressly rests its judgment on the procedural default. *Muniz*, 132 F.3d at 220; *Moore v. Roberts*, 83 F.3d 699, 702 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 772 (1997). The Fifth Circuit has held that the Texas contemporaneous objection rule is an independent and adequate state procedural bar. *Muniz*, 132 F.3d at 221; *Livingston v. Johnson*, 107 F.3d 297, 311-12 (5th Cir. 1997); *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir. 1995). Penry does not argue that he meets the cause and prejudice or actual innocence exceptions to the procedural default rule. To the extent that Penry's *Simmons* claim rests on the trial court's failure to grant his motion for a mistrial based on the prosecutor's future dangerousness argument, he has procedurally defaulted that claim.

B. The Trial Court's Instructions

Penry's *Simmons* claim can also be read as a challenge to the trial court's failure to instruct the jury on the remoteness of Penry's chances for parole, based on

Penry's signed "waiver." The Court of Criminal Appeals rejected Penry's *Simmons* claim on the merits, holding that under Texas law "[t]he matter of parole or a defendant's release thereon is not a proper consideration for a jury's deliberations in the punishment phase of a capital murder trial." *Penry*, 903 S.W.2d at 764. The Texas court's conclusion is consistent with the Fifth Circuit decision in *Allridge*, and is neither contrary to, nor an unreasonable application of, clearly established federal law.

Penry argues that his case is distinguishable from *Allridge* because he offered, in a written, signed statement, to become "parole ineligible." Penry offers the affidavit of Dr. James W. Marquart, a professor of criminology at Sam Houston State University, opining that the Texas parole board would have given "great weight" to Penry's signed "waiver" in deciding whether to grant Penry parole in the future. (Docket Entry No. 19, Appendix, Ex. C, Affidavit of James W. Marquart, ¶ 4). Dr. Marquart recognized that Penry's signed statement was not a legally binding waiver of parole, but stated that "a parole board would have seen that document and given it great weight in determining whether Mr. Penry should be paroled, "even if Penry "changed his mind and sought to 'take back' this statement." (*Id.*, ¶¶ 4, 7). In Dr. Marquart's opinion, the combination of the nature of Penry's crime and Penry's signed statement would have "forever erased [Penry's] chances of parole." (*Id.*, ¶ 18). Penry argues that in sentencing, the jury was entitled to consider that for all practical purposes, Penry would not receive parole.

It is undisputed that Penry's statement of waiver did not make him "legally ineligible" for parole. Dr. Marquart's affidavit speculates as to what the parole board might decide in the future. The Fifth Circuit cases clearly hold that *Simmons* is restricted to situations in which the defendant is presently ineligible for parole, as a matter of law. *See Boyd*, 1999 WL 71660, at *5; *Muniz*, 132 F.3d at 224; *Woods*, 75 F.3d at 1037; *Johnson v. Scott*, 68 F.3d 106, 111 (5th Cir. 1995); *Montoya*, 65 F.3d at 416; *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir. 1994). As the court stated in *Allridge*:

> A capital defendant's parole ineligibility . . . must be a matter of law because evidence of such ineligibility is inherently "truthful" and allows the defendant to deny or explain the state's case for future dangerousness. But if a defendant's ineligibility is a matter of fact, i.e., the defendant *probably* will not be eligible for parole, then the evidence is purely speculative (maybe even inherently "untruthful") and therefore cannot positively deny future dangerousness. The jury is left only to speculate about what a parole board may, or may not, do twenty or thirty years hence.

Allridge, 41 F.3d at 221-22 (citations omitted) (emphasis in original).

Penry argues that his case is different from *Allridge* because the prosecutor based his future dangerousness argument on Penry's danger to "free" society, improperly referencing a possibility of parole. The case law does not support Penry's proffered distinction. Even when the prosecution argues that a defendant will be a future danger to "free" society, *Simmons* does not apply unless

the defendant is legally ineligible for parole. *Id.* at 222. Penry's case does not violate *Simmons* simply because the prosecutor argued that Penry may be a future danger to "free" society.

This court must follow binding Fifth Circuit precedent. That precedent establishes that the Texas Court of Criminal Appeals' rejection of Penry's *Simmons* claim was not "contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court." This court DENIES Penry's *Simmons* claim.[11]

VII. The *Estelle v. Smith* Claim (Claim V)

In *Estelle v. Smith*, 101 S. Ct. 1866 (1981), the Supreme Court held that the prosecution's use of a capital murder

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[11] Penry requests an evidentiary hearing on his *Simmons* claim. Penry argues that he could offer evidence "regarding how often, if ever, a defendant tried for capital murder has been paroled – at any point in his or her sentence." (Docket Entry No. 28, p. 39). Even if Penry presented such evidence, it would not distinguish his case from the *Allridge* line of cases. This court may not grant an evidentiary hearing on a claim which the petitioner has failed to develop in state court unless "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). Penry's alleged constitutional error does not relate to his guilt. Moreover, even if Penry could prove the facts underlying the claim, he would not be entitled under *Allridge* to a reversal of his sentence. Penry's request for an evidentiary hearing to develop his *Simmons* claim is DENIED.

defendant's pretrial psychiatric examination in the sentencing phase as the basis for an examining psychiatrist's opinion as to the defendant's future dangerousness violated the Fifth and Sixth Amendments. The Supreme Court held that in the absence of proper *Miranda* warnings and an effective waiver from the defendant, the Fifth Amendment privilege against self-incrimination precluded the State from using statements the defendant made during the pretrial psychiatric examination to prove the defendant's future dangerousness. *Id.* at 1876.

In *Buchanan v. Kentucky*, 107 S. Ct. 2906 (1987), the Supreme Court clarified that its holding in *Estelle* did not apply if the defendant requested a pretrial psychiatric examination or if the defendant presented psychiatric evidence at trial. *Id.* at 2917-18. The Fifth Circuit has held that the first exception, that the defendant requests the examination, applies only if the defendant specifically requests an evaluation as to his future dangerousness. *See Vanderbilt v. Collins*, 994 F.2d 189, 196 (5th Cir. 1993); *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir. 1981).

In *Estelle v. Smith*, the Supreme Court also found that the State's failure to give defense counsel notice of the examination, including its scope and nature, violated the defendant's Sixth Amendment rights. *Estelle*, 101 S. Ct. at 1877. The State violates the Sixth Amendment if defense counsel is told that the defendant will be examined, but not that the examination will be used as evidence of the defendant's future dangerousness. *Vanderbilt*, 994 F.2d at 198. In *Powell v. Texas*, 109 S. Ct. 3146 (1989), the Court held that a defendant does not waive his Sixth Amendment right to counsel even if the defendant waives a Fifth Amendment challenge to the State's use of statements he

or she made in a pretrial psychiatric examination by requesting the examination or by introducing psychiatric evidence. *Id.* at 3150.

Penry argues that both his Fifth and Sixth Amendment rights were violated when the prosecution presented testimony from three psychiatrists and then used that testimony to argue that Penry would be dangerous in the future and that his mental status did not make the death sentence inappropriate.

A. The Psychiatric Testimony and the Prosecution's Argument

1. Dr. Fason's Testimony

During the guilt/innocence phase of Penry's second trial, Dr. Fason told the jury that he had conducted one three-minute interview with Penry and one twenty-minute interview. During both interviews, Penry communicated fully, identified his lawyer, and acted appropriately. (S.F. Vol. 46, pp. 786-88). Dr. Fason denied that he observed "any kind of a psychosis, or other type of mental illness" in Penry during the interviews. (*Id.*, p. 788). Dr. Fason discussed the accuracy of IQ tests and noted that a personality disorder, such as an antisocial personality, could affect a person's score on an IQ test. (*Id.*, pp. 788-92). Dr. Fason stated that he had reviewed "rather extensive" records "pertaining to Johnny Paul Penry's prior history" and records of neurological testing done on Penry. (*Id.*, pp. 794-95). Dr. Fason stated that he disagreed with a report that concluded that Penry "may have a significant degree of brain damage." (*Id.*, p. 795).

The prosecutor then asked Dr. Fason for his opinion as to Penry's mental status in 1979, when the alleged rape and murder occurred. Dr. Fason concluded that "based on all of those records that [he] reviewed and [his] personal interviews with [Penry], the tests, [Dr. Fason's] training and experience and education," Penry "is on the borderline between mild mental retardation and dull normal." (*Id.*, p. 796). Dr. Fason also testified that Penry "has a personality disorder, an anti-social personality disorder." (*Id.*). Dr. Fason admitted that a person with an antisocial personality disorder could also be referred to as a "psycho-path." (*Id.*). Dr. Fason described an antisocial personality as "a person that has repeated difficulties with authority. They tend to be very selfish, callous and self-centered." (*Id.*, p. 798). Dr. Fason testified that he did not know of a cure for an antisocial personality. (*Id.*, p. 800). Dr. Fason then again explained that an antisocial personality disorder could lower a person's score on an IQ test.

The prosecutor asked Dr. Fason whether Penry "is the type of person that looks up to an authority figure." (*Id.*, p. 804). Dr. Fason testified that he believed Penry does not respect authority and would not be "led easily by other people" because of his antisocial personality. (*Id.*, pp. 804-05). Dr. Fason also testified that he believed Penry had the capacity to act intentionally and possessed the intellectual capability to understand *Miranda* warnings and waive those warnings knowingly and intelligently. (*Id.*, pp. 811-13).

Although Dr. Fason did not specifically testify as to Penry's future dangerousness, the prosecutor referred to Dr. Fason's testimony during the sentencing phase of the

trial in arguing Penry's future dangerousness. (S.F. Vol. 51, pp. 1933-34).

2. Dr. Quijano's Testimony

During the sentencing phase, Dr. Quijano testified that although Penry's IQ test scores placed him in the "mildly mentally retarded" to "borderline" range of intelligence, Penry's "adaptive skills" were sufficient to classify him as "not mentally retarded." (S.F. Vol 50, pp. 1629, 1648). Dr. Quijano also testified that he believed Penry had the ability to control his actions. After Dr. Quijano denied that Penry was retarded or had organic brain damage, Dr. Quijano testified that Penry suffered from an antisocial personality disorder. (*Id.*, pp. 1648-49). As evidence of Penry's antisocial personality, Dr. Quijano noted

> repeated violations of the law, disregard of the rights of others, the inability to learn from previous experience in the sense that one does not profit from the punishment or from being caught. There is an element of cold bloodiness [sic] without it, the person does not experience remorse. . . .

(*Id.*, p. 1651). Dr. Quijano also testified that persons with an antisocial personality and a history of violence could be classified as dangerous and that there is no cure for an antisocial personality. (*Id.*, p. 1652). Dr. Quijano testified that he believed Penry "is more likely to engage in continuing acts of violence in the future." (*Id.*, p. 1654).

3. Dr. Samenow's Testimony and Dr. Peebles' Report

Dr. Samenow testified during the sentencing phase that he believed Penry to have an "anti-social personality." (*Id.*, p. 1731). Dr. Samenow agreed that Penry was aggressive, violent, manipulative, dangerous, and unremorseful. (*Id.*, pp. 1734-36). When asked if he believed Penry was likely to change, Dr. Samenow testified that "the prognosis would be pretty bleak." (*Id.*, p. 1736).

In his testimony during the sentencing phase of Penry's 1990 trial, Dr. Samenow made only one reference to a report from Dr. Peebles, who had examined Penry before his 1977 conviction for aggravated rape. Penry's counsel had requested that Dr. Peebles examine Penry. (S.F. Vol. 47, p. 1058). Dr. Samenow noted that Dr. Peebles' report reflected that Penry "on occasion, heard voices and saw things, but . . . he probably learned this at Rusk State Hospital and is using this as an excuse to cover up his offenses." (S.F. Vol. 50, p. 1729). Dr. Samenow then testified that "TDC Medical Records" showed that Penry had on occasion used his mental retardation as an excuse for violent or destructive behavior. (*Id.*, pp. 1730-31). Dr. Samenow testified that he had developed his diagnosis of Penry's antisocial personality from a review of "records" showing that Penry had a history of committing "anti-social acts" and a "broad range of criminal activity." (*Id.*, pp. 1731-32). Dr. Samenow testified that he based his conclusion that Penry's crimes were planned or premeditated from these same "records" and from Penry's "prior criminal and violent behavior." (*Id.*, pp. 1733-34). Dr. Samenow broadly referred to the "TDC

Medical Records" as supporting his opinion that Penry could exercise self-control; could act deliberately; was aggressive, violent, and manipulative; was capable of acting voluntarily; and was dangerous and unlikely to change. (*Id.*, pp. 1734-37).[12]

4. The Prosecutor's Use of Dr. Peebles' Report in Closing Argument

In closing argument, the prosecutor used Dr. Peebles' report to argue Penry's future dangerousness:

> In 1977, this man raped Diana Rearden. A few months later he was examined by Dr. Felix Pebbles [sic], who found that he was sane. He knew the difference between right and wrong, and he was competent to stand trial, but, Dr. Pebbles [sic], went on and made an additional finding that was really out of the ordinary, and I have never seen this in any kind of a report, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons.

(S.F. Vol. 51, pp. 1946-47).

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[12] Dr. Samenow's description of the records he reviewed in preparing to testify shows that Dr. Peebles' report was one of many documents that Dr. Samenow consulted. Dr. Samenow testified that he reviewed

> [t]he confession of the Defendant that was dated 1979, I believe, two of them. Information concerning 1977 rape conviction involving a Diana Koch. The Defendant's records from Austin State Hospital, University of Texas Medical Branch at Galveston, TDC Medical and Mental Health Records, Mental Health or records from the Polk County Mental Health and Mental Retardation Unit, records from the Mexia State School, records from the Texas Rehabilitation Commission, the Rusk State Hospital, the Goose Creek Independent School District, Competency and Insanity Examination by Dr. Kenneth A. Vogtsberger, TDC Disciplinary Records on this Defendant, both for his current incarceration and prior incarceration, I believe a Competency Trial Transcript. . . .

(S.F. Vol. 50, pp. 1715-16).

B. The Findings and Conclusions of the State Court

On Penry's direct appeal, the Texas Court of Criminal Appeals thoroughly discussed Penry's *Estelle v. Smith* claim and, applying the Supreme Court rulings in *Estelle* and *Buchanan*, rejected the claim. *Penry*, 903 S.W.2d at 757-60. As to the Sixth Amendment claim, the Texas court found that Penry's attorney was "on notice that if he intended to put on a 'mental status' defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Id.* at 758-59. The court also found that Penry was not examined for future dangerousness. Based on these findings, the Texas court concluded that there had been no Sixth Amendment violation.

As to Penry's Fifth Amendment claim, the Texas Court of Criminal Appeals found that the testimony of Dr. Fason, who did not testify regarding future dangerousness, was proper rebuttal testimony under *Buchanan*. The state court noted that Dr. Quijano had testified as to Penry's future dangerousness but did not base his opinion on his examination of Penry. *Id.* at 759. As to Dr.

Peebles' 1977 examination, the state court found that defense counsel had requested that examination and that during the 1990 trial, no expert witness referred to any testimonial statements contained in the Peebles report. *Id.* The state appellate court specifically found that Dr. Samenow and Dr. Quijano did not base their opinions regarding future dangerousness on Dr. Peebles' examination and report. *Id.* Based on these facts, the Texas court concluded that *Estelle* did not apply to Penry's trial and did not support his claim for relief. *Id.* The Texas court determined that Penry's claim regarding the prosecutor's closing argument was procedurally barred. *Id.* at 760.

This court finds that Penry has failed to rebut, by the necessary clear and convincing evidence, the presumption that the state court's factual findings are correct, as the AEDPA requires. The legal conclusions of the Texas Court of Criminal Appeals are neither contrary to, nor an unreasonable application of, clearly established federal law, and they are not based on an unreasonable determination of the facts in light of the evidence presented. This court DENIES Penry's request for federal habeas relief on his *Estelle v. Smith* claim.

C. Harmless Error Analysis

Even if this court rejected the Texas Court of Criminal Appeals' findings and concluded that Dr. Fason's testimony violated *Estelle v. Smith* to the extent that it went beyond rebutting the testimony Penry offered by providing an opinion as to future dangerousness, the error was harmless under *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993).

Under *Brecht*, a trial error of constitutional magnitude does not entitle a defendant to habeas relief unless the error " 'had a substantial or injurious effect or influence in determining the jury's verdict.' " *Id.* at 1722 (quoting *Kotteakos v. United States*, 66 S. Ct. 1239, 1253 (1946)); *see also Harris v. Warden, Louisiana State Penitentiary*, 152 F.3d 430, 437 (5th Cir. 1998); *Woods v. Johnson*, 75 F.3d at 1017, 1026-33 (5th Cir. 1996) (applying the *Brecht* standard to reject a petitioner's *Estelle* claim). In *Woods*, the Fifth Circuit found the prosecution's violation of *Estelle* to be harmless because the psychiatrist's testimony as to future dangerousness was "equivocating and weak"; the jury could not reasonably construe the psychiatrist's testimony as based on his examination of the defendant; and the prosecution primarily relied on other evidence of the defendant's future dangerousness. *Woods*, 75 F.3d at 1027, 1028-33. The *Woods* court found the psychiatrist's testimony to be "equivocating and weak" for two reasons. The psychiatrist admitted that behavioral scientists' efforts to predict future behavior were not very accurate. He also testified only that someone who had committed violent acts in the past was "more likely" to commit future violent acts. *Id.* at 1027.

Dr. Fason's direct testimony on Penry's future dangerousness was highly "equivocating and weak," so much so that it is debatable whether he even testified as to future dangerousness. Additionally, on cross-examination, Dr. Fason substantially limited the potential impact of his direct testimony. After Penry's counsel asked Dr. Fason if he would need longer than a twenty-minute examination to make a diagnosis of an antisocial personality, Dr. Fason answered that, although he would not

need additional time to make a "diagnosis," he would need significantly more time to make a prognosis as to the future and, indeed, could not make such a prognosis as a scientific opinion. (S.F. Vol. 46, p. 821). This testimony is similar to the psychiatrist's testimony in *Woods*, disclaiming an ability to predict the defendant's future dangerousness beyond a statement that someone with a past history of violent acts has a greater likelihood of committing future violence than a person with no prior violent conduct.

Dr. Fason's testimony on direct examination was less inflammatory than testimony presented in cases finding harmful error. *See Satterwhite v. Texas*, 108 S. Ct. 1792, 1799 (1988) (the psychologist testified that the defendant unequivocally "will present a continuing threat to society by continuing acts of violence," was "as severe a sociopath as you can be," and was "beyond the reach of psychiatric rehabilitation"); *Estelle*, 101 S. Ct. at 1871 (the psychologist testified that the defendant was a "very severe sociopath" who would "continue his previous behavior," whose sociopathic condition would "only get worse," and who would "go ahead and commit other similar or same criminal acts if given the opportunity to do so").

In addition, the record reflects that Dr. Fason's diagnosis drew primarily from sources other than his examination of Penry. Although Dr. Fason included the examination in his diagnosis, he disagreed that the diagnosis was made "on the basis of" the interview. (S.F. Vol. 46, p. 820). Dr. Fason had also reviewed Penry's "rather extensive" medical records in reaching his conclusions.

Dr. Fason testified on redirect examination that his diagnosis of Penry's antisocial personality was his "impression, diagnostic impression, and that is based on review of all of the records." (*Id.*, p. 829). *See Woods*, 75 F.3d at 1028-30 (the psychiatrist's limited opinion concerning the defendant's future dangerousness was based primarily on a hypothetical given by the prosecutor); *Savino v. Murray*, 82 F.3d 593, 605-06 (4th Cir. 1996) (finding harmless error when the expert "said he reviewed numerous outside materials" in diagnosing the defendant).

Finally, Dr. Fason's testimony was a very small part of the prosecution's evidence of Penry's future dangerousness. Two other experts, Drs. Quijano and Samenow, testified far more extensively and unequivocally than Dr. Fason that Penry would be a future danger. Dr. Quijano testified during the sentencing phase that Penry was "likely to engage in continuing acts of violence in the future." (S.F. Vol. 50, p. 1654). Dr. Samenow testified that the possibility that Penry's antisocial behavior would change "would be pretty bleak." (*Id.*, p. 1736). The prosecution also presented testimony during the sentencing phase from five prison guards and a deputy sheriff that Penry had committed violent and aggressive acts while in custody and had a reputation for being dangerous. Four of the prison guards specifically testified that they believed Penry would be a future danger. (S.F. Vol. 47, pp. 970, 983, 1008-09, 1157-60). The prosecution also presented Penry's 1977 aggravated rape conviction and testimony from the victim, as well as testimony from the woman Penry identified in his confession as someone he wanted to rape.

In his closing argument, the prosecutor relied far more heavily on evidence of Penry's dangerousness other than Dr. Fason's testimony. The prosecutor made only a brief reference to Dr. Fason's testimony to support his argument as to Penry's future dangerousness. *See Woods*, 75 F.3d at 1032 (noting that the objectionable references to the psychiatrist's testimony constituted less than ten percent of the prosecutor's closing argument).

The aggravated nature of Penry's crime, the inculpatory and remorseless statements in his confessions, and Penry's other violent acts, all supported the prosecution's future dangerousness argument. In *Woods*, the court found that admission of the psychiatrist's testimony was harmless error, in part because "[t]he real strength of the prosecution case on future dangerousness was the nature of the crime itself . . . coupled with the [previous] conviction and fifteen-year sentence for attempted aggravated rape." *Id.*; *see also Savino*, 82 F.3d at 605 ("At sentencing, the Commonwealth presented compelling evidence of Savino's prior criminal record and his own statements of his criminal history. The nature of the crime and the circumstances surrounding it certainly revealed viciousness and dangerousness.").

This court concludes that the admission of any testimony by Dr. Fason that could be characterized as evidence of Penry's future dangerousness did not have a "substantial and injurious effect" on the jury's verdict. Even if this court were to determine that Dr. Fason's testimony violated the Supreme Court's decision in *Estelle v. Smith*, the court would conclude that the error was harmless. The court DENIES Penry's *Estelle* claim.

VIII. The Exclusion of Evidence of Shirley Penry's Mental Illness (Claim VI)

During the sentencing phase of his retrial, Penry offered two hospital records documenting post-partum psychotic, schizophrenic behavior by Shirley Penry, Penry's mother. The trial court excluded the documents. (S.F. Vol. 49, pp. 1561-65). Penry argues that the trial court's exclusion of the evidence violated his constitutional rights by preventing the jury from hearing and considering relevant mitigating evidence.

The Court of Criminal Appeals upheld the trial court's exclusion of the evidence as irrelevant, finding that "the records did not discuss whether [Penry's] mother abused any of her children, or even whether her mental condition made it likely that she would abuse her children. There was no evidence that her psychological problems would have led to child abuse." *Penry*, 903 S.W.2d at 762. The determination by the state appellate court that the evidence was irrelevant is not an unreasonable application of clearly established federal law and cannot provide a basis for granting Penry federal habeas relief under the AEDPA.

A state trial court's ruling that the proffered testimony is inadmissible is entitled to deference by a federal habeas court. *See Panzavecchia v. Wainwright*, 658 F.2d 337, 340 (5th Cir. 1981) ("[F]ederal courts are compelled to defer to a state court's interpretation of its own criminal laws, rules of evidence and rules of criminal procedure." (citing *Spencer v. Texas*, 87 S. Ct. 648 (1967))); *see also Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998) ("[I]n habeas

actions, this court does not sit to review the mere admissibility of evidence under state law."); *Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir.), *cert. denied*, 118 S. Ct. 399 (1997). The Supreme Court has repeatedly declined to "fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. . . . The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings." *Romano v. Oklahoma*, 114 S. Ct. 2004, 2011 (1994). "[A] state trial court's evidentiary rulings will mandate habeas relief when errors are so extreme that they constitute a denial of fundamental fairness." *Little*, 162 F.3d at 862.

Applying these standards of review, this court concludes that the state court's evidentiary ruling does not provide a basis for the relief Penry seeks. To the extent Penry offered the evidence to support his claim that he was abused as a child, the Texas Court of Criminal Appeals correctly found that Penry's mother's medical records did not relate specifically to the child abuse issue. To the extent Penry offered the evidence to rebut testimony by Dr. Samenow, the proffered evidence was not proper rebuttal because Dr. Samenow acknowledged that Shirley Penry had "serious problems of her own." (S.F. Vol. 50, p. 1763)

Penry asserts that, even if the proffered evidence is otherwise inadmissible under Texas law, the state court's ruling violates his constitutional rights, citing *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), *Eddings v. Oklahoma*, 102 S. Ct. 869 (1982), and *Lockett v. Ohio*, 98 S. Ct. 2954 (1978). A capital defendant may offer as mitigating evidence

"any aspect of [his] character or record and any of the circumstances of the offense that [he] proffers as a basis for a sentence less than death." *Lockett*, 98 S. Ct. at 2964. The Supreme Court has "emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individual determination [in capital sentencing proceedings]." *Buchanan*, 118 S. Ct. at 761. The sentencing jury cannot be precluded from considering relevant mitigating evidence. *Eddings*, 102 S. Ct. at 876-77. The Supreme Court requires that the proffered mitigating evidence be relevant.

Relevant mitigating evidence of a defendant's background must be causally connected to the articulated reason for the defendant's reduced culpability. *See Lincecum v. Collins*, 958 F.2d 1271, 1284 (5th Cir. 1992) (holding that the petitioner's evidence that as a child he had been left to live with his aunt was not mitigating evidence because the petitioner did not show that these circumstances "produced such a turbulent and unsteady family situation that [the defendant] suffered from emotional problems which would reduce his moral culpability for his crime"); *Graham v. Collins*, 950 F.2d 1009, 1033 (5th Cir. 1992) (en banc) (holding that evidence of the petitioner's mother's frequent hospitalizations for mental illness was not proper mitigating evidence because the petitioner did not present "evidence of *any* effect this had on [him], or of any reaction on his part to it"), *aff'd*, 113 S. Ct. 892 (1993).

The state trial court did not preclude Penry from introducing relevant mitigating evidence. Penry introduced significant and extensive evidence showing the abuse his mother inflicted on him, beginning when he

was an infant and continuing throughout his childhood. Penry also introduced substantial evidence of Shirley Penry's mental illness and violent tendencies. Penry's sister testified that Shirley Penry had "mental problems." (S.F. Vol. 48, p. 1122). Penry's aunt, Lucille Anderson, told the jury that Shirley Penry physically attacked her. (*Id.*, p. 1169). Billie Johnson, a neighbor when Penry was a child, testified that Shirley Penry "wasn't friendly. When I was in my back yard and she was in her yard, she would lift her dress on both sides with her hand and dance around the yard singing old lady Johnson, old lady Johnson, and I just ignored her." (*Id.*, p. 1252). Shirley Penry's sister, Marilyn Barnet, testified that Shirley Penry exhibited "evidence of mental illness" on "quite of few occasions," including an attempt to burn Barnet's house down. (*Id.*, p. 1264). Barnet also told the jury that Shirley Penry had "pulled knives" on her, (*id.*, p. 1275); that Shirley Penry's husband had said he was "afraid of "his wife, (*id.*, p. 1271); and that Barnet herself was afraid of Shirley Penry. (*Id.*, p. 1275).

Penry also introduced evidence that specifically referred to the episodes of Shirley Penry's mental illness described in the excluded documents. Penry introduced a document from the Mexia State School, which Penry attended as a child, which reflected that after Penry's birth Shirley Penry had "suffered a post-partum psychosis" and had resided in the "Oklahoma State Hospital for ten months." (S.F. Vol. 49, p. 1571). Lucille Anderson testified that after Penry's birth, Shirley Penry "had to be put in a mental hospital." (S.F. Vol. 48, p. 1163; *see also id.*, pp. 1189, 1191). Another aunt, Patsy Ross, testified that Shirley Penry had "a nervous breakdown" after Penry's

birth and required hospitalization. (*Id.*, p. 1242). Dr. Quijano referred to a document that made reference to Shirley Penry's "post-partum psychosis." (S.F. Vol. 50, p. 1691).

The record clearly establishes that the trial court did not prevent the jury from hearing and considering relevant mitigating evidence regarding Penry's childhood abuse inflicted by his mother, who suffered from mental illness. The trial court required that the evidence be "presented in a form acceptable to the law of evidence before [Penry] is entitled to insist that it be received over objection." *See Lewis v. State*, 815 S.W.2d 560, 568 (Tex. Crim. App. 1991), *cert. denied sub nom., Lewis v. Texas*, 112 S. Ct. 1296 (1992).

Additionally, even if this court concluded that the trial court's exclusion of medical records from Shirley Penry's psychotic episodes in 1956 and 1963 was erroneous, the trial court's ruling did not have a "substantial and injurious effect" on the jury's verdict. *Brecht*, 113 S. Ct. at 1722; *see also United States v. Washington*, 106 F.3d 983, 1000 (D.C. Cir. 1997) (holding that the trial court's exclusion of evidence relating to the defendant's good character was harmless error under *Brecht* because the evidence was cumulative of other character evidence). The jury heard substantial evidence about the abuse Penry suffered as a child. The jury also heard extensive evidence regarding Shirley Penry's mental illness and violent behavior, including evidence of her post-partum psychosis; her "violent episodes"; her attack on Penry's aunt; her attempt to burn down her sister's house; her "pulling knives" on her sister; her bizarre behaviors; and

the fact that her husband and her sister were "afraid" of her.

This court DENIES Penry's claim for federal habeas relief based on the trial court's exclusion from evidence of his mother's medical records.

IX. The State's Failure to Administer Penry's Anti-Psychotic Medicine (Claim VII)

Penry argues that the prosecution violated *Brady v. Maryland*, 83 S. Ct. 1194 (1963), by failing to disclose to Penry's counsel that Penry was not administered his prescribed anti-psychotic and anti-depressant medication during his competency trial. Penry argues that the prosecution violated *Giglio v. United States*, 92 S. Ct. 763 (1972), when it elicited false testimony from a Texas Department of Corrections[13] physician regarding Penry's medication schedule. Penry also appears to argue that the denial of his anti-psychotic medication violated *Riggins v. Nevada*, 112 S. Ct. 1810 (1992).

Penry raised these three claims in his state habeas petition. The state habeas court held an evidentiary hearing on the claims on July 3, 1997. The habeas court issued findings of fact and conclusions of law in an order filed on September 23, 1997.[14] (Findings of Fact, Conclusions of

[13] The Texas Department of Criminal Justice (TDCJ) was formerly known as the Texas Department of Corrections (TDC).

[14] Penry argues that the state court findings of fact are *per se* unreasonable because much of the state court's findings of fact are a verbatim recitation of the State's proposed findings of fact. The Texas Code of Criminal Procedure requires only that the

Law and Order, *Ex parte Penry*, No. 71,120) ("*Findings and Conclusions*") (found at S.H. Vol. 4, pp. 141-95)). The Texas Court of Criminal Appeals affirmed the habeas court's findings of fact and conclusions of law, without opinion.

The state habeas court found that on April 2, 1990, Penry's medicine schedule was changed to include two doses of the anti-psychotic drug Triavil, to be administered together "p.m." (*Findings and Conclusions*, p. 7). Penry's Triavil prescription was continued on April 26, 1990. (*Id.*, p. 8). Jury selection in Penry's competency trial began on May 7, 1990. On May 16, 1990, the jury found Penry competent to stand trial. The habeas court found that Penry's medical records, which listed the date and time that Penry was administered each of several prescription drugs, did not indicate that Penry had been administered Triavil from May 7 through 12, 1990, and on May 14 and 16, 1990. (*Id.*, p. 11). The medical records did reflect that Penry had been administered Triavil on each of the other days in May 1990, "except as otherwise

state habeas court make "written findings of fact . . . [and] conclusions of law." Tex. Code Crim. Proc. art. 11.071 § 9(e). The Texas Code of Criminal Procedure does not prohibit the state court from adopting the State's proposed findings of fact. *See Nichols v. Scott*, 69 F.3d 1255, 1277 (5th Cir. 1995); *Cockrum ex rel. Welch v. Johnson*, 934 F. Supp. 1417, 1427 (E.D. Tex. 1996) (noting that the state court's "adoption of findings prepared by the State's attorney, and the concomitant deference to her research, is not objectionable, although it is certainly not laudable"), *rev'd on other grounds*, 119 F.3d 297 (5th Cir. 1997). To gain relief, the AEDPA requires Penry to show by clear and convincing evidence that the state court's factual determinations are unreasonable in light of the evidence, regardless of the format in which the state court issues its findings of fact.

noted." (*Id.*). The habeas court found that at no time before or during Penry's competency trial did Penry's counsel object to the administration of Triavil or object to the State's alleged failure to administer Triavil on the above dates. (*Id.*, p. 12).

A. The *Brady* Claim

The state habeas court assumed that Penry had not received Triavil on the questioned dates. The court concluded that the prosecution's failure to inform Penry's counsel of the prison's apparent failure to provide Penry his prescribed medication did not violate *Brady*. The state habeas court reasoned that: (1) the prosecution was not aware that Penry had not received Triavil; (2) Penry himself was aware that he had not received Triavil and could have informed his counsel of this fact; and (3) Penry's counsel could have discovered this fact by the exercise of reasonable diligence. (*Id.*, p. 18). The state habeas court held that the undisclosed evidence was not favorable to Penry because the failure to administer Triavil would have made Penry appear *less* competent. (*Id.*, p. 21). The court also held that the evidence was not material to Penry's claim of incompetence. Because Penry's dosage of Triavil was not enough to have altered Penry's competency to stand trial, there was not a reasonable probability that had the information been disclosed to the defense, the outcome of the competency trial would have been different. (*Id.*, p. 22).

To establish a claim under *Brady*, Penry must show that "(1) the prosecutor suppressed or withheld evidence (2) which was favorable and (3) material to the defense."

Castillo v. Johnson, 141 F.3d 218, 222 (5th Cir. 1998). The courts have held that the prosecution does not violate *Brady* when the defendant already knew about the allegedly withheld evidence or could have obtained it through the exercise of reasonable diligence. *Id.* at 223 (citing *Brown v. Cain*, 104 F.3d 744, 750 (5th Cir.), *cert. denied*, 117 S. Ct. 1489 (1997)). In this case, the state habeas court reasonably found that Penry would have been aware that he did not receive Triavil on the relevant dates. *Cf. id.* (rejecting the petitioner's *Brady* claim that the prosecution withheld evidence of his "intoxication and drug abuse history"); *West v. Johnson*, 92 F.3d 1385, 1398-99 (5th Cir. 1996) (rejecting the petitioner's *Brady* claim that the prosecution withheld evidence that his confession of stealing a necklace was fabricated), *cert. denied*, 117 S. Ct. 1847 (1997).

Penry argues that his mental retardation may have prevented him from informing his counsel that his Triavil had been withheld. A careful reading of the record does not support this argument. A jury found Penry competent to stand trial, finding that Penry had the "capacity to understand the nature and object of the proceedings against him, to *consult with counsel, and to assist in preparing his defense.*" *Drope v. Missouri*, 95 S. Ct. 896, 903 (1975) (emphasis added). Penry has not presented evidence to rebut the court's factual determination that Penry could have told his lawyers of the interruption in his medication.

The state habeas court also held that the prosecution did not violate *Brady* because the prosecution was not aware of the interruption in Penry's Triavil dosage. Penry does not dispute that the prosecution was subjectively

unaware of the interruption. However, Penry argues that the TDC medical personnel who would have been aware of the interruption were acting on the government's behalf.

A prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." *Kyles v. Whitley*, 115 S. Ct. 1555, 1567 (1995). Courts have interpreted *Kyles* to apply only to "others" who aid the government's *investigation* of the case against the defendant. *See United States v. Avellino*, 136 F.3d 249, 255-56 (2d Cir. 1998); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996); *see also Smith v. Secretary of New Mexico Dept. of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) ("[T]he 'prosecution' for *Brady* purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in *investigative* aspects of a particular criminal venture.") (citation and footnote omitted) (emphasis added). The evidence presented at the evidentiary hearing did not show that TDC medical personnel were involved in the prosecution's preparation for Penry's competency trial. TDC medical personnel did not testify on behalf of the prosecution at Penry's competency trial. There is no evidence that Penry's medication schedule was a part of the State's case in the competency trial. The state habeas court's ruling that the prosecution did not violate *Brady* because the prosecutor was unaware of the interruption in the administration of Penry's Triavil was not an unreasonable application of federal law.

The state habeas court also found that evidence of the medication interruption would not have been favorable

to Penry under *Brady*'s second prong. The state court cited testimony from Dr. Mount, a psychologist who testified for Penry at the competency trial, that psychotropic drugs such as Triavil would "make the person appear to function more normally" and "appear competent." (S.F. Vol. 11, p. 758-59). Other evidence presented at the competency hearing regarding the effect of a withdrawal of Triavil supports the state habeas court's ruling. In response to questioning from Penry's counsel, Dr. Quijano testified as follows:

> Q: The effect of the psychotropic drugs, that is taken even as we appear here now, is obviously going to have some effect to calm him down and bring his conduct within what we regard as normal, isn't it?
>
> A: Yes. That would have some effect.

(S.F. Vol. 12, p. 962).

Witnesses at the state habeas evidentiary hearing on July 3, 1997 offered consistent and similar testimony. Dr. Edward Gripon, a psychiatrist, testified that Triavil would help to "control [Penry's] behavior" and "would tend to help [Penry] to be a little more relaxed." (S.H. Vol. 1, p. 34). Dr. Gripon also testified that Triavil "might help [Penry] to be somewhat calmer and get a better nights rest." (*Id.*). Dr. Gripon testified that an abrupt cessation of Triavil could potentially result in "the recurrence of whatever symptoms that medication were offsetting. . . . " (*Id.*, p. 44).

> Q: And if they were psychotic, the psychosis would return?

> A: If they were psychotic before and this small of a dose of Triavil would offset that, then at some point in time it could return. You can't predict with medical probability that it would return in that six day window . . . but [it] could return in the absence of the medicine if the medicine effectively intended to improve that, yes.

(*Id.*, pp. 44-45). Although Dr. Gripon testified that a cessation of Triavil might not result in a noticeable effect on Penry's behavior, he clearly did not testify that a cessation would have such a *positive* effect that the jury would have mistakenly thought Penry was competent.

Dr. Jonathan Lipman, a neuropharmacologist, testified that a cessation of Triavil could result in a return of the patient's psychosis and a "psychotic episode." (*Id.*, p. 135). Dr. Lipman testified that a sudden withdrawal from Triavil could have noticeable effects, including "intense levels of anxiety and agitation." (*Id.*, p. 136).

The state habeas court's finding that the withdrawal of Triavil would, at most, have made Penry appear *less* competent was not an unreasonable determination of the facts in light of the evidence. The state court's conclusion that the interruption of Penry's Triavil medication during his competency trial was not evidence favorable to Penry was not an unreasonable application of clearly established federal law.

This court DENIES Penry's *Brady* claim.[15]

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[15] Penry also argues that the July 3, 1997 state habeas hearing was inadequate because the state court unreasonably limited his pre-hearing discovery. 28 U.S.C. § 2254(e)(1) provides that state court factual determinations are presumed to be correct. Penry must rebut this presumption by clear and convincing evidence. *Id.* Penry has not presented clear and convincing evidence that additional discovery would have altered the state court's findings of fact. The evidence presented at the July 3, 1997 hearing overwhelmingly supported the state court's finding that if the interruption in Penry's medication had any short-term effect, it would be to make Penry appear less competent. Penry does not identify another basis for concluding that the state court's limitation on his discovery was unreasonable.

B. The *Giglio* Claim

The state habeas court, following an evidentiary hearing, rejected Penry's *Giglio* claim. The court found that the prosecutor had elicited false testimony from Penry's expert psychologist, Dr. George Mount, that at the time of the competency trial, Penry was prescribed only one pill to help him sleep. However, the court held that the factual error was immaterial to the issue of Penry's competency and that the prosecution did not know that Dr. Mount's testimony was false. (*Findings and Conclusions*, pp. 33-36).

To prove that the prosecution violated his due process rights under *Giglio*, Penry must show that: (1) false testimony was presented at trial; (2) the prosecution had actual knowledge that the testimony was false; and (3) the testimony was material. *Carter v. Johnson*, 131 F.3d 452, 458 (5th Cir. 1997).[16] Penry contends that the

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[16] Penry asserts that the State violates *Giglio* if it "should have known" that it was eliciting false testimony. The Fifth Circuit cases require that the State have actual, subjective knowledge of the falsity of the testimony to violate *Giglio*. *See*,

prosecution elicited the following false testimony from Dr. Mount in cross-examination on May 14, 1990:

> Q: Okay. Did you notice [in Penry's medical records] the dosages?
>
> A: I didn't notice them.
>
> Q: Did you notice that he is only given one tablet a day and that is at night to sleep?
>
> A: I do recall some of that.

(S.F. Vol. 11, pp. 760-61). Penry argues that this testimony was false because his medical records reflect a prescription for one dosage each of Triavil 4/50, Triavil 2/10, and Cogentin per day and because these drugs were anti-psychotic and anti-depressant medication that did more than merely enable Penry to sleep.

The state habeas court found that Dr. Mount's testimony was false, but also found that the district attorney who elicited the testimony had no knowledge of its falsity. The state court relied on an affidavit submitted by the district attorney, who stated that in preparing for the competency trial, he had inadvertently relied on an incomplete set of Penry's medical records. (*Findings and Conclusions*, p. 34). Penry does not challenge this statement. Because the district attorney was mistaken as to Penry's medication schedule, he would not have known that Dr. Mount was incorrect in concurring that Penry was given more than one dosage of medicine daily.

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e.g., United States v. OKeefe, 128 F.3d 885, 893 (5th Cir. 1997); *Fuller v. Johnson*, 114 F.3d 491, 496 (5th Cir. 1997).

The state court's finding that the prosecution did not have subjective knowledge of the falsity of Dr. Mount's testimony is presumed correct and was not unreasonable. This court DENIES Penry's *Giglio* claim.

C. The *Riggins* Claim

The state habeas court rejected Penry's *Riggins* claim, finding that Penry had not objected to the State's administration of Triavil and that the interruptions in the administration of Triavil had not occurred during the guilt/innocence phase of Penry's trial. (*Id.*, pp. 37-38). The Texas Court of Criminal Appeals affirmed without an opinion.

In *Riggins*, the Supreme Court held that the State's involuntary administration of antipsychotic drugs to the petitioner during the guilt/innocence and sentencing phases of his capital murder trial violated his due process rights. *Riggins*, 112 S. Ct. at 1815. The Court stated that administration of the medication might not have violated the petitioner's rights if the State had established that petitioner needed the drugs and that the drugs were medically appropriate. *Id.*

Penry does not state the factual basis for his *Riggins* claim. The state court denied Penry's *Riggins* claim in part because, unlike the petitioner in *Riggins*, Penry did not move the trial court to suspend the administration of his medication. The *Riggins* decision was clearly predicated on the involuntary nature of the administration of the medication. "[F]orcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical

appropriateness." *Id.* Penry did not object to the administration of the medicine and there is no evidence that it was administered involuntarily.

The state court reasonably found that the State did not violate Penry's rights under *Riggins*. *See Adanandus v. Johnson*, 947 F. Supp. 1021, 1083-84 (W.D. Tex. 1996) (rejecting the petitioner's *Riggins* claim because petitioner did not allege that he had been forcibly or involuntarily medicated). This court DENIES Penry's *Riggins* claim.

X. Penry's Claim That His Execution After Eighteen Years on Death Row Would Violate the Eighth Amendment (Claim VIII)

Penry argues that the eighteen-year delay since the imposition of his first death sentence has caused him "psychological torture" that violates the Eighth Amendment. Penry also argues that his execution would violate the Eighth Amendment because it would no longer serve the State's interest in either deterrence or retribution.

Penry raised these claims in his state habeas petition. The state habeas court denied the claims, holding that (1) the State of Texas did not unreasonably delay in carrying out the death sentence; (2) an eighteen-year period between sentencing and execution does not violate the Eighth Amendment; (3) Penry's execution would not have been considered cruel and unusual at the time the Bill of Rights was adopted; and (4) Penry's execution does not offend evolving standards of decency. (*Findings and Conclusions*, pp. 41-46). The Court of Criminal Appeals affirmed the trial court's findings and conclusions.

The state court's rulings were not contrary to clearly established federal law, as determined by the Supreme Court. Penry does not challenge the state court's ruling that his execution would not have been considered cruel and unusual at the time the Bill of Rights was adopted. Penry does not cite Supreme Court or circuit court precedent holding that "psychological torture" caused by an eighteen-year stay on death row, and repeated setting of execution dates, so offends "evolving standards of decency" as to violate the Constitution. The Fifth Circuit has explicitly rejected this argument. *See White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996).

Penry cites Justice Stevens' dissent from the denial of *certiorari* in *Lackey v. Texas*, 115 S. Ct. 1421 (1995) (Stevens, J., dissenting from denial of *certiorari*), and *Gregg v. Georgia*, 96 S. Ct. 2909 (1976), as Supreme Court precedent supporting the proposition that a petitioner's execution after eighteen years on death row is cruel and unusual punishment because it can no longer serve a deterrent or retributive function. The circuit courts have repeatedly rejected such an extension of *Gregg* sought by petitioners whose stays on death row rival or exceed Penry's. *See, e.g., Carter*, 131 F.3d at 466 (a delay of fourteen years between sentencing and execution); *Lackey v Johnson*, 83 F.3d 116, 117 (5th Cir. 1996) (a delay of seventeen years); *White*, 79 F.3d at 439-40 (a delay of seventeen years); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (a delay of fifteen years); *McKenzie v. Day*, 57 F.3d 1461, 1467-68 (9th Cir. 1995) (a delay of twenty years); *Lackey v. Scott*, 52 F.3d 98, 100 (5th Cir. 1995) (a delay of sixteen years); *Free v. Peters*, 50 F.3d 1362, 1362 (7th Cir. 1995) (a delay of over fifteen years).

Penry seeks to distinguish these precedents by arguing that his stay on death row presents unique factors. Penry requests an opportunity to conduct factfinding and discovery with respect to this claim. However, the facts Penry argues he should have the opportunity to try to prove – that the psychological harm caused by a lengthy stay on death row and threat of execution violates evolving standards of decency, and that an eighteen-year delay between sentencing and execution does not serve a deterrent or retributive function – are the same types of facts considered in earlier cases. The courts in these cases rejected the argument that a stay on death row as long as Penry's, involving similar factors, yields a cognizable Eighth Amendment claim. As the Fifth Circuit noted in *White*:

> [T]here are compelling justifications for the delay between conviction and the execution of a death sentence. The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as White to challenge their convictions for years. White has benefitted from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights.

White, 79 F.3d at 439; *see also Stafford*, 59 F.3d at 1028 (refusing to find the petitioner's claim cognizable under the Eighth Amendment despite the fact that he had faced seven execution dates in his fifteen years on death row).

Penry has not made the required showing for an evidentiary hearing under 28 U.S.C. § 2254(e)(2).

Courts have also held that such claims are not cognizable when, as here, the petitioner has availed himself of the appeals process during the delay. *See, e.g., White*, 79 F.3d at 439; *McKenzie*, 57 F.3d at 1466-67 ("The delay has been caused by the fact that McKenzie has availed himself of procedures our law provides. . . . "); *Fearance v. Scott*, 56 F.3d 633, 639 (5th Cir. 1995) ("[A]t every turn, [defendant], without complaining about the accumulating period on death row, sought extensions of time, hearings and reconsiderations."); *Free*, 50 F.3d at 1362 (noting that most of defendant's time on death row "resulted from [his] pursuit of his discretionary appeals in both state and federal court"). Penry offers no evidence that he moved to expedite review of his appeals. Although Penry argues that his case is different because he spent approximately ten years on death row under a death sentence ultimately deemed unconstitutional, the cases do not support the argument that a delay resulting from a successful habeas challenge would make a subsequent conviction and death sentence unconstitutional. In *White*, the petitioner's death sentence was vacated approximately three years after a conviction that followed a successful federal habeas challenge. 79 F.3d at 436. In *Lackey*, the petitioner's first capital murder conviction and death sentence were reversed on direct appeal approximately five years after the conviction. 52 F.3d at 99. However, neither the *White* court nor the *Lackey* court granted habeas relief based on the petitioners' claims that the protracted length of their stays on death row was unconstitutional.

The state habeas court's adjudication of the merits of Penry's claim of delay is neither contrary to, nor an unreasonable application of, clearly established federal law and is not based on an unreasonable factual determination based on the evidence presented. This court DENIES Penry's claim that his execution after eighteen years on death row would violate the Eighth Amendment.

XI. Penry's Claims Regarding His Confessions (Claim IX)

Penry alleges that the trial court's admission, over objection, of his two confessions, violated his constitutional rights under *Miranda v. Arizona*, 86 S. Ct. 1602 (1966). Specifically, Penry argues that he did not "intelligently" waive his rights under *Miranda* and did not receive effective Miranda warnings.

The Texas Court of Criminal Appeals fully addressed this claim on direct appeal. *Penry*, 903 S.W.2d at 744-50. The Texas appellate court ruled that the trial court did not err in failing to define "intelligently"; that Penry did not object to the trial court's failure to define "warn" and therefore had procedurally defaulted that claim; that the trial court did not err in failing to include an instruction that the officers must have "effectively communicated" the *Miranda* warnings; and that the trial court did not err in failing to suppress Penry's confessions. *Id.* at 745-48.

A. Respondent's Procedural Arguments

Respondent initially argues that Penry's *Miranda* claim is barred by 28 U.S.C. § 2244(b) as a "second or successive" petition and/or by the law of the case doctrine.

In his first federal habeas petition, Penry claimed that the trial court erred in failing to suppress his confessions because Penry gave them involuntarily and because Penry did not knowingly and intelligently waive his *Miranda* rights. *See* Order Denying First Amended Petition for Writ of Habeas Corpus and Dissolving Stay of Execution, *Penry v. McCotter*, No. L-86-89-CA, at 29-40 (E. D. Tex. 1987); *Penry v. Lynaugh*, 832 F.2d 915, 918 (5th Cir. 1987). In that petition, Penry did not present any claims that the trial court gave an incorrect jury instruction concerning the confessions. Respondent argues that each of Penry's claims is barred as an abuse of the writ. Penry's pending petition is not a "second or successive" petition subject to the restrictions of 28 U.S.C. § 2244(b), because it attacks his second conviction and sentence. *See, e.g., Esposito v. United States*, 135 F.3d 111, 113 (2d Cir. 1997); *Pratt v. United States*, 129 F.3d 54, 62 (1st Cir. 1997); *Palmer v. Clarke*, 961 F.2d 771, 774-75 (8th Cir. 1992). Respondent's argument fails.

Respondent alternatively argues that this court may not reach the merits of Penry's voluntariness and waiver claims under the law of the case doctrine. The law of the case bars this court's consideration of an issue previously decided by a court in this case. *United States v. Mendez*, 102 F.3d 126, 131 (5th Cir. 1996). In *Penry v. Lynaugh*, the Fifth Circuit considered and rejected Penry's claims. The

court described Penry's claims as follows: "Penry also argues that his confession was involuntary and that he did not voluntarily waive his *Miranda* rights. Most of Penry's argument on both issues centers on his low intellect and inability to freely confess or waive his rights." *Penry v. Lynaugh*, 832 F.2d at 918. In his brief to the Fifth Circuit, Penry argued that his mental retardation made him susceptible to suggestion and prevented him from appreciating the consequences of a waiver. Brief for the Petitioner-Appellant at 40-42, *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987) (No. 87-2466) (citing *Jurek v. Estelle*, 623 F.2d 929, 937 (5th Cir. 1980); *Cooper v. Griffin*, 455 F.2d 1142, 1146 (5th Cir. 1972)).

The law of the case doctrine applies to Penry's voluntariness and waiver claims. However, a court may decline to apply the law of the case doctrine if evidence in a subsequent appeal is "substantially different" than that considered by the first court to rule on the issue, or if "controlling authority has since made a contrary decision of the law" applicable to the issues. *Society of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 735 (5th Cir. 1997). Penry argues that in his 1990 suppression hearing, he presented new evidence that the officers who read him his *Miranda* rights were aware of his low intelligence. However, the officers testified that despite their awareness of Penry's low intelligence, they believed that he understood the warnings and the consequences of waiving his rights. Moreover, as more fully discussed below, the officers' subjective perception of Penry's level of intelligence does not determine whether his confession or waiver was voluntary, intelligent, and knowing.

In addition, Penry does not identify a controlling "contrary decision of the law" that would result in a different Fifth Circuit ruling. In this appeal, Penry bases his argument on *Miranda v. Arizona*, 86 S. Ct. 1602 (1966) and *Moran v. Burbine*, 106 S. Ct. 1135 (1986), cases already decided in 1987, when the Fifth Circuit rejected Penry's claim. Penry does not fall within the exceptions to the law of the case doctrine.

Respondent argues that Penry's claims regarding the jury instructions are barred by *Pratt* because Penry had the "incentive and ability" to raise them in his first habeas petition, but did not. This court does not read *Pratt* to bar consideration of Penry's jury instruction claims. Approximately twelve years have passed since Penry filed his first federal habeas petition. Fifth Amendment case law has been refined in those twelve years. Applying *Pratt* to bar this court's consideration of Penry's jury instruction claims would deprive Penry of the opportunity to argue that the last twelve years of Fifth Amendment jurisprudence provide a basis for his claims. This court will address the merits of Penry's jury instruction claims. Although not required to do so, this court will also address the merits of Penry's claims relating to the voluntariness of Penry's confessions and his waiver of his *Miranda* rights.

B. The Factual Background

The state trial court held pretrial suppression hearings before Penry's 1980 trial and before the 1990 retrial. At the 1990 hearing, the trial court heard testimony from four law enforcement officers, each of whom had testified

at the 1980 hearing. The state court also heard testimony from a psychologist presented by Penry. The trial court took judicial notice of the transcript of the 1980 suppression hearing, the testimony by Dr. Peebles from Penry's 1980 trial, and the 1980 finding that Penry was competent to stand trial. (S.F. Vol. 5, pp. 305-06). The record of both hearings establishes the following facts relevant to the circumstances under which Penry gave the two written confessions he challenges here.

On the morning of October 25, 1979, Officer Nelson heard a report on his police radio giving the description that Pamela Carpenter had provided of her attacker. Nelson believed that Penry matched the description of the attacker. Nelson went to Penry's father's house and asked Penry to accompany him to the Livingston police station. At the station, Ted Everitt, an investigator with the Polk County district attorney's office, read Penry his *Miranda* warnings. (1990 S.F. Vol. 5, p. 68). Everitt asked Penry if he understood the warnings; Penry answered "yes" and nodded his head. (*Id.*, p. 74). Everitt did not ask Penry to explain his understanding of the warnings. (*Id.*, p. 98). Everitt did not define any of the terms of the warnings. (*Id.*, p. 78). Everitt did not know whether Penry was "mentally normal," (*id.*, p. 76), but did not have the impression that Penry was "stupid or something." (Id., p. 97). Everitt did not know whether Penry could read or write. (*Id.*, p. 70). Based on his exchange with Penry, Everitt believed that Penry had understood the *Miranda* warnings. (*Id.*, p. 98).

The officers later took Penry to the murder scene. At the scene, Penry told Nelson that he "want[ed] to tell [Nelson] the truth about it." (1980 S.F. Vol. 4, p. 152).

Deputy Bob Grissom who was with Penry and Nelson, then read Penry the *Miranda* warnings again. Grissom asked Penry if he understood each of his rights. Penry answered "yes" and nodded his head. (1990 S.F. Vol. 5, p. 23). Grissom did not ask Penry to explain his answer and did not further inquire into Penry's understanding of the warnings. (*Id.*, pp. 23-24). After receiving the warnings, Penry confessed to the crime. Nelson testified that he considered Penry to be of "normal intelligence" and to have a "normal IQ." (*Id.*, pp. 28, 38). Nelson did not know whether Penry could read or write. (*Id.*, p. 27).

The officers took Penry back to the police station. The officers filled out a written complaint charging Penry with the capital murder of Pamela Carpenter. Penry appeared before Justice of the Peace Garnet Galloway, who read Penry the "magistrate's warnings," which are substantially similar to *Miranda* warnings.[17] Judge

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[17] The Justice of the Peace read the following warnings to Penry:

> (1) You are charged with the offense of Capital Murder. . . .
>
> (2) You have a right to hire a lawyer and have him present prior to and during any interview and questioning by peace officers or attorneys representing the State. If you are too poor to afford a lawyer, you have the right to request the appointment of a lawyer to be present prior to and during any such interview and questioning. You may have reasonable time and opportunity to consult your lawyer if you desire.
>
> (3) You have the right to remain silent.

Galloway asked Penry if he understood the rights; Penry said that he did. (1980 S.F. Vol. 4, p. 205). In front of the magistrate, Penry's father read Penry the *Miranda* warnings. Penry's father asked Penry if "he did it." (*Id.*, p. 184). Penry answered "yes." (*Id.*).

William Smith, the police chief in Livingston, Texas, asked Penry to give a statement at the police station about the crime. Penry agreed. Smith read Penry his *Miranda* rights. Smith testified that Penry did not "appear to have any difficulty in understanding anything" that Smith said to Penry. (1990 S.F. Vol. 5, p. 108). Smith testified that he believed Penry "understood what I was saying to him and he responded with a good answer." (*Id.*, p. 120). Smith believed that Penry was of "normal intelligence." (*Id.*). Smith did not ask Penry to explain what the warnings meant. (*Id.*, p. 120). Smith also testified that Penry "was able to recite the occurrences that appear in this statement easily." (1980 S.F. Vol. 4, p. 194).

Smith transcribed the first of Penry's written confessions. (1990 S.F. Vol. 5, p. 111). Immediately before taking Penry's statement, Smith learned that Penry could not read or write. (*Id.*, p. 126). This information did not affect Smith's opinion that Penry was not mentally retarded. (*Id.*, p. 140). After Smith took the statement, Smith read

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(4) You are not required to make a statement, and any statement you make can and may be used against you in Court.

(5) You have the right to stop any interview or questioning at any time.

(6) You have the right to have an examining trial.

(1990 Jury Trial; State's Exhibit No. 44).

the statement back to Penry and asked if "that was his statement." (*Id.*, p. 126). The officers then brought two citizens "in off the street" to read the statement aloud to Penry. (*Id.*). Before the citizens read the statement, Smith again read Penry the *Miranda* warnings. (*Id.*, p. 133).

On October 26, 1979, Maurice Cook, a Texas Ranger, took a second written confession from Penry. At approximately 10:00 a.m., Cook read Penry the statutory *Miranda* warnings. Before he read Penry the warnings, Cook knew that Penry could not read or write. (*Id.*, p. 158). Cook thought that Penry's intelligence level "was less than mine, and less than a lot of people." (*Id.*). Cook testified that he "probably" had learned before the interview that Penry was considered a "slow learner." (*Id.*, p. 173). Cook testified that he read the warnings "with extra precaution" and "br[oke] [the warnings] down and explain[ed] it to him." (*Id.*, p. 159).

After informing Penry that he had the right to remain silent, Cook explained that "it meant that he didn't have to tell me anything, that's in essence, then he acknowledged that he understood that." (1980 S.F. Vol. 4, p. 224). After informing Penry that any statement may be used against him, Cook explained to Penry that "if he gave a written statement, or his oral statement could possibly be used in court if he was tried for this offense that he was charged with, and he acknowledged that he understood that." (*Id.*). After informing Penry that he had a right to an attorney, Cook told him:

> that he had the right to have that lawyer present while we talked, and asked him further did he know what a lawyer was, and he said he did. And we had a discussion about an attorney, and

> he said he didn't need one. And then I went on to advise him, "if you're too poor to hire a lawyer, then the court will appoint a lawyer for you free of charge, and he can advise you before and during any questioning." And we talked about that, and I explained that a little bit more in detail. And I also told him, "you can decide to talk with anyone, and you can stop talking to them at any time you want." And I explained to him that if he decided to talk, that he could quit talking at any time, and he acknowledged that he understood that. I also told him that the above rights are continuing rights, which can be urged by him at any stage of the proceeding; in other words, I explained that to him in plain terms, it means that he can invoke – he can have his lawyer here any time he wants to.

(*Id.*, p. 225).

In the 1990 hearing, Cook testified that in addition to reading the warnings to Penry, Cook also "explained the rights to him. In other words, when I used the word attorney or lawyer, I even asked him if he knew what they were." (1990 S.F. Vol. 5, p. 153). Cook further testified:

> Of course, I gave him all the requirements in *Miranda* and I went through, I think there is basically, what five parts of the *Miranda*, and I would stop each time and go over and explain to him, do you know you can have your own attorney present, and he acknowledged that he could. I went on to explain about having him present, he could urge his rights at anytime, because urging is something that I felt needed further definition, I explained what urge meant, that he could have the lawyer here at anytime

> he wanted to, stop talking anytime he wanted to, and I got down fairly basic with the interpretation of what his rights were.

(*Id.*, p. 154). Penry told Cook, in response to specific questions, that he understood each of the rights. (*Id.*, pp. 154-55). Cook asked Penry to explain what a "lawyer" and "trial" were. Penry's answers satisfied Cook that Penry understood the terms. (*Id.*, p. 155). Cook then took a written statement from Penry. Cook repeated the *Miranda* warnings before he read a draft of Penry's statement back to him. (*Id.*, p. 163).

At his 1990 suppression hearing, Penry offered the testimony of Dr. Windall Dickerson, a psychologist. Dr. Dickerson testified that in his opinion, it was unlikely that Penry had understood the consequences of waiving his rights. (*Id.*, pp. 207, 216). Dr. Dickerson testified that the officers reading the *Miranda* warnings should have asked Penry what particular words in the warnings meant to verify that Penry understood his rights. (*Id.*, pp. 203-04). The trial court denied Penry's motion to suppress the two written confessions. (*Id.*, p. 308).

At trial, the court instructed the jury on the admissibility of Penry's confessions, as follows:

> You are instructed that under our law a confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible in evidence if it appears that the same was freely and voluntarily made, without compulsion or persuasion, provided, however, that it be made in writing and signed by the accused, and show

> that the accused has been warned prior to making such statement or confession. . . .

(Trans. Vol. 4, p. 1000). With respect to both written confessions, the court instructed:

> If . . . you find beyond a reasonable doubt that the aforementioned warning was given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights hereinabove set out in the said warning, and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement or confession for any purpose whatsoever or any evidence obtained as a result of the same.

(*Id.*, p. 1002).

This court analyzes Penry's claims against this record.

C. The Voluntariness and Waiver Claim

The Court of Criminal Appeals rejected Penry's claim that he had confessed involuntarily and without effectively waiving his Fifth Amendment right against self-incrimination. The court found that Penry voluntarily confessed because there was no evidence of coercion. *Penry*, 903 S.W.2d at 745-46 & n.27. The court found that Penry had voluntarily, knowingly, and intelligently waived his *Miranda* rights because the evidence showed that Penry had the "basic reasoning skills" necessary to

understand the rights, that he actually understood the rights, and that he had voluntarily waived those rights. *Id.* at 746.

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 107 S. Ct. 515, 522 (1986); *see also Colorado v. Spring*, 107 S. Ct. 851, 857 (1987) (holding that a waiver of *Miranda* rights is involuntary only if accompanied by coercive conduct); *United States v. Male Juvenile*, 121 F.3d 34, 41 (2d Cir. 1997) ("The question [regarding the voluntariness of the defendant's waiver] is whether the government agents somehow misled defendant into believing that he could choose to speak without consequences, thus denying him any rational choice of whether to waive his rights and confess."); *Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1990) ("[The defendant's] age and mental capacity are relevant to our due process inquiry only if we first conclude that the police's conduct was coercive.").

Penry offers no evidence that his confessions were induced or accompanied by police coercion. Although some of the officers who read Penry his *Miranda* rights were aware of Penry's low intelligence, there is no evidence that officers preyed upon Penry's low intelligence to coerce him into confessing or waiving his rights. The Court of Criminal Appeals' rejection of Penry's claim that his confessions were involuntary was not an unreasonable application of clearly established federal law, as determined by the Supreme Court.

In *Moran v. Burbine*, 106 S. Ct. 1135 (1986), the Supreme Court made it clear that a defendant's waiver of his *Miranda* rights must be both "voluntary" and "knowing and intelligent." The Court wrote:

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both if the nature of the right being abandoned and the consequences of the decision to abandon it. Only of the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. at 1141 (citations omitted). A waiver is knowing and intelligent if the defendant "understood that he had the right to remain silent and that anything he said could be used as evidence against him." *Spring*, 107 S. Ct. at 857. "The Constitution does not require that a criminal suspect understand every possible consequence of a waiver of the Fifth Amendment privilege." *Id.* The Eleventh Circuit case Penry cites, *Smith v. Zant*, 887 F.2d 1407 (11th Cir. 1989), confirms this holding:

> A defendant need not understand all the complexities of his fifth amendment rights and of the implications of a decision to waive those rights. Rather, the defendant must understand only the core of the fifth amendment guarantee. . . . In determining whether a waiver of rights is valid, therefore, a court need only inquire into whether the defendant understood that he had a right "not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time" and that "whatever he chooses to say may be used as evidence against him." The court does not concern itself with whether the defendant's decision to waive his rights was the "better" choice.

Id. at 1430 (Kravitch, J., concurring in part and dissenting in part).

Courts have consistently rejected the argument Penry asserts in this case. A waiver is not invalid merely because the defendant is of low intelligence or even retarded. *See, e.g., Rice v. Cooper*, 148 F.3d 747, 749-50 (7th Cir. 1998) (holding that an "illiterate and mildly retarded 16-year old" knowingly and voluntarily waived his *Miranda* rights); *Male Juvenile*, 121 F.3d at 38, 40-41 (holding that a 16-year old with "attentional difficulties" and "borderline to low average range of intellectual functioning with a Full Scale IQ of 71" knowingly and voluntarily waived his *Miranda* rights); *Taylor v. Rogers*, No. 95-3904, 1996 WL 515349, at *3 (6th Cir. Sept. 10, 1996) (unpublished table decision, 97 F.3d 1452) (holding that a "mildly to moderately retarded" defendant, who had "a mental age of eight to nine years old," knowingly and voluntarily waived his *Miranda* rights); *Mathenia v. Delo*, 975 F.2d 444, 448 (8th Cir. 1992) (holding that the defense counsel did not render ineffective assistance by failing to move for the suppression of defendant's confession based on the defendant's mild mental retardation and his IQ of 70); *Toste v. Lopes*, 861 F.2d 782, 783 (2d Cir. 1988) (holding that the defendant, who had a "personality disorder" and "low intelligence level," and who "operated at a sixth to

seventh grade level," knowingly and voluntarily waived his *Miranda* rights); *Dunkins v. Thigpen*, 854 F.2d 394, 399 (11th Cir. 1988) ("Mental retardation does not by itself prevent a defendant from voluntarily waiving his constitutional rights."); *United States v. Glover*, 596 F.2d 857, 866 (9th Cir. 1979) (finding that the defendant with low intelligence scores and "extensive dealings with the criminal process" had sufficient experience to familiarize himself with his *Miranda* rights and his option to waive those rights).

Penry has failed to present clear and convincing evidence to rebut the Court of Criminal Appeals' finding that Penry understood his rights and the consequences of waiving them. The evidence in the record clearly supports the appellate court's finding. Judge Galloway and each of the four law enforcement officers involved in reading Penry his *Miranda* rights, hearing his waiver of those rights, and hearing his confessions, all testified that Penry appeared to understand the *Miranda* warnings. This court need not rely on conclusory testimony that Penry understood the warnings: the record discloses that Ranger Cook specifically explained each of the rights to Penry, plainly and clearly. Penry's explanations of the meaning of the words "lawyer" and "trial" convinced Ranger Cook that Penry understood the warnings.

Penry's expert psychologist, Dr. Windall Dickerson, testified in the state court suppression hearing that he did not believe Penry understood the consequences of his waiver. Penry argues that the law enforcement officers did not rebut Dr. Dickerson's expert testimony. However, the trial court was entitled to give more weight to the officers' testimony than to Dr. Dickerson's testimony. The

trial court determined the factual disputes; that factual determination is entitled to a presumption of correctness under the AEDPA. The trial court's determination of mixed questions of law and fact was not an unreasonable application of clearly established federal law.

This court DENIES Penry's claim that the trial court erred in failing to suppress his confessions because the confessions were involuntary and because his waiver of his *Miranda* rights was not voluntary, knowing, and intelligent.

D. The Claims Relating to the Jury Instructions

Penry objected to the jury charge because "it fails to define the word 'intelligently', as regards the waiver of *Miranda* rights, so as to require an appreciation of the significance of the relinquishment of those rights in a mature and meaningful way." (Trans. Vol. 4, p. 991). The trial court denied Penry's objection and did not include in the charge a definition of "intelligently." The Court of Criminal Appeals denied Penry's objection, finding that the term "intelligently" did not need a specific definition in the charge because the term was used in its ordinary meaning. *Penry*, 903 S.W.2d at 747.

The Fifth Circuit has held that a Texas state court does not err in failing to define terms that have a "common" or "plain" meaning. *Nethery v. Collins*, 993 F.2d 1154, 1162 (5th Cir. 1993); *Milton v. Procunier*, 744 F.2d 1091, 1096 (5th Cir. 1984); *see also United States v. Brito*, 136 F.3d 397, 407 (5th Cir. 1998) ("[T]he trial judge need not define statutory terms unless they are highly 'technical or specific,' or 'outside the common understanding' of

jurors." (quoting *United States v. Chenault*, 844 F.2d 1124, 1131 (5th Cir. 1988))). Penry cites no authority for his argument that the word "intelligently" does not have a "common" or "plain" meaning or was "outside the common understanding" of the jurors.

In *Colorado v. Spring*, the Supreme Court held that a defendant knowingly and intelligently waives his *Miranda* rights when he understands "that he had the right to remain silent and that anything he said could be used as evidence against him." 107 S. Ct. at 857. Penry need not have "understood every possible consequence of a waiver." *Id.* This construction of "intelligently" does not require more than the plain or common meaning, within the common understanding of jurors. The Court of Criminal Appeals' denial of Penry's claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court authority.

Penry also objected to the jury charge on the ground that the trial court failed to include a definition of the word "warn." The Court of Criminal Appeals refused to address the merits of this claim because Penry did not object to the instructions on this ground at trial. *Penry*, 903 S.W.2d at 747. Penry has therefore procedurally defaulted this claim. *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998).

Penry raised another objection to the jury charge, asserting that it incorrectly failed to instruct the jury that the officers must have "effectively communicate[d]" the *Miranda* warnings. (Trans. Vol. 4, p. 986). The Court of Criminal Appeals rejected Penry's claim because under Texas precedent, it is sufficient if the jury is instructed

that the waiver must have been voluntary, intelligent, and knowing. *Penry*, 903 S.W.2d at 748. Penry cites no Supreme Court or Fifth Circuit precedent to support his claim that additional instructions are required when the defendant has the intellectual impairments Penry possesses. The Court of Criminal Appeals' denial of Penry's claim was not contrary to clearly established federal law.

This court DENIES Penry's claims that the jury instructions regarding his confessions violated his Fifth Amendment rights.

XII. The Claim Based on the Denial of the Motion to Change Venue for the Retrial (Claim X)

Penry asserts that the trial court's denial of his motion to change the venue for his retrial from Walker County violated his Sixth and Fourteenth Amendment rights. He argues that he could not receive a fair trial in Walker County because "prejudicial pretrial publicity, the community's preexisting familiarity with [his] case – in particular his prior conviction and death sentence – and the special characteristics of the community . . . precluded selection of an impartial jury." (Docket Entry No. 18, p. 68). Penry does not take the position that his rights under the Sixth and Fourteenth Amendments were violated as a result of actual prejudice; instead, Penry argues that "the community in which he was tried was indeed 'so saturated' with prejudice as to make the selection of an impartial jury 'virtually impossible.' " Docket Entry No. 28, p. 68).

On direct appeal, the Texas Court of Criminal Appeals discussed the evidence presented at the change

of venue hearing. That court noted the absence of any evidence that TDCJ employees would necessarily be biased jurors. The Texas appellate court found that Penry "failed to show that publicity created a prejudice so great as to prevent a fair trial." *Penry*, 903 S.W.2d at 731. The court specifically found that Penry "was tried by jurors who had no opinion as to his guilt and . . . he received a fair trial." *Id.*

Whether pretrial publicity, or other aspects of a community from which a jury is drawn, preclude the availability of impartial jurors is a mixed question of law and fact. *Irvin v. Dowd*, 81 S. Ct. 1639, 1643 (1961); *see also Patton v. Yount*, 104 S. Ct. 2885, 2891 (1984). " '[E]ach case must turn on its special facts.' " *Calley v. Callaway*, 519 F.2d 184, 204 (5th Cir. 1975) (quoting *Marshall v. United States*, 79 S. Ct. 1171, 1173 (1959)). Consistent with the fact-specific nature of the impartiality inquiry, cases involving pretrial publicity are analyzed in light of the "totality of circumstances." *Murphy v. Florida*, 95 S. Ct. 2031, 2036 (1975); *Sheppard v. Maxwell*, 86 S. Ct. 1507, 1517 (1966); *Mata v. Johnson*, 99 F.3d 1261, 1271 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997). Ultimately, the question is whether, given the "totality of circumstances," the petitioner's trial was "fundamentally fair." *Murphy*, 95 S. Ct. at 2036.

A. Pretrial Publicity and Presumed Prejudice

Pretrial publicity alone may warrant a presumption of prejudice, that is, a presumption that an impartial jury could not be drawn from the community exposed to the publicity. *Rideau v. Louisiana*, 83 S. Ct. 1417, 1419-20

(1963); *see also Murphy*, 95 S. Ct. at 2035. When a presumption of prejudice exists, a review of the voir dire transcript is unnecessary. *Rideau*, 83 S. Ct. at 1419-20. If pretrial publicity does not in itself require a presumption of prejudice, the court examines the voir dire transcript to ascertain whether the potential prejudicial publicity compromised the jury's ability to be impartial. *See Patton*, 104 S. Ct. at 2889-90; *Murphy*, 95 S. Ct. at 2036-37; *Irvin*, 81 S. Ct. at 1645. The voir dire may reveal actual, "identifiable" prejudice on the part of a juror, *Estes v. Texas*, 85 S. Ct. 1628, 1633 (1965), or it may "permit[ ] an inference of actual prejudice" on the part of the jury as a whole. *Murphy*, 95 S. Ct. at 2038.

In *United States v. Chagra*, the Fifth Circuit interpreted this case law to set out three circumstances in which a habeas petitioner "can obtain reversal of his conviction because of pretrial publicity":

> First, [the habeas petitioner] can demonstrate an actual, identifiable prejudice attributable to the publicity in question on the part of a member of the jury which decided his case. An appellant must prove that such prejudice existed "not as a matter of speculation but as a demonstrable reality." Proof of such prejudice is normally made by reliance upon the juror's voir dire responses. Second, an appellant can demonstrate that prejudicial, inflammatory publicity about his case so saturated the community from which his jury was drawn as to render it virtually impossible to obtain an impartial jury. Proof of such poisonous publicity raises a presumption that appellant's jury was prejudiced, relieving him of the obligation to establish actual prejudice by a juror in his case. This

> presumption is rebuttable, however, and the government may demonstrate from the voir dire that an impartial jury was actually impanelled in appellant's case. If the government succeeds in doing so, the conviction will stand despite appellant's showing of adverse pretrial publicity. Finally, an appellant can establish both that pretrial publicity about his case raised "a significant possibility of prejudice," and that the voir dire procedure followed by the district court in his case failed to provide a " 'reasonable assurance that prejudice would be discovered if present.' "

669 F.2d 241, 249-50 (5th Cir. 1982) (citations omitted), *overruled on other grounds by Garrett v. United States*, 105 S. Ct. 2407 (1985). Penry argues that his retrial falls within the second circumstance described in *Chagra*.

Citing *Rideau*, the Fifth Circuit has stated that the "presumed prejudice" standard "is only 'rarely' applicable." *United States v. OKeefe*, 722 F.2d 1175, 1180 (5th Cir. 1983); *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980) (quoting *Nebraska Press Ass'n v. Stuart*, 96 S. Ct. 2791, 2800 (1976)). In *Rideau*, the Court reversed the conviction of a habeas petitioner whose interrogation by, and admissions to, the sheriff were filmed and broadcast three times by the local television station to a large segment of the community from which his jury was drawn. *Rideau*, 83 S. Ct. at 1418. The Court noted that it need not "paus[e] to examine a particularized transcript of the voir dire examination of the members of the jury," for "[a]ny subsequent court proceedings in a community so pervasively

exposed to such a spectacle could be but a hollow formality." *Rideau*, 83 S. Ct. at 1419-20. The Fifth Circuit interprets *Rideau* as requiring two showings: (1) "an 'extreme situation' of inflammatory pretrial publicity that literally saturated the community in which his trial was held"; and (2) "that the populace from which his jury was drawn was widely infected by a prejudice apart from mere familiarity with the case." *Chagra*, 669 F.2d at 251 (quoting *Mayola*, 623 F. 2d at 997, 999).

With respect to the first showing, the Fifth Circuit looks for publicity that "approximates in the level of its prejudicial nature the dramatic spectacle of Rideau's televised confession." *Mayola*, 623 F.2d at 997. With respect to the second showing, the petitioner must present "circulation figures or other evidence of the degree of community exposure to the prejudicial content of the offensive news coverage." *Id.* at 998.

In determining the level of prejudicial pretrial publicity, the Supreme Court has looked to the quantity, time, nature, and content of the publicity. While a large quantity of "adverse" publicity increases the probability of prejudice, *see Irvin*, 81 S. Ct. at 1644, a large amount of publicity is not in itself sufficient to create a presumption of prejudice. In *Dobbert v. Florida*, the Court found the petitioner's argument "that the extensive coverage by the media denied him a fair trial" inadequate because it "rest[ed] almost entirely on the quantum of publicity which the events received." 97 S. Ct. 2290, 2303 (1977).

The publicity must have occurred near the time of the trial. In *Patton*, the Court observed that most of the

adverse publicity at issue had centered around the petitioner's first trial. Jury selection for the second trial, the one challenged as unfair, took place four years later. *Patton*, 104 S. Ct. at 2889. The Court distinguished Patton's case from the facts involved in *Irvin*, in which "during the six or seven months immediately preceding trial . . . 'a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against [the defendant].' " *Id.* (quoting *Irvin*, 81 S. Ct. at 1644) (second alteration in original). The *Patton* Court stated that although "[i]t would be fruitless to attempt to identify any particular lapse of time that in itself would distinguish the situation that existed in *Irvin*[,] . . . it is clear that the passage of time between a first and a second trial can be a highly relevant fact." *Id.* at 2891.

The Court also considers the nature of the publicity, including whether most of the publicity consists of negative editorial or straightforward factual reporting. *See Patton*, 104 S. Ct. at 2887; *Sheppard*, 86 S. Ct. at 1510-12. In *Beck v. Washington*, 82 S. Ct. 955, 963 (1962), the Court distinguished between "straight news stories" and "invidious articles which would tend to arouse ill will and vindictiveness."

Reports of confessions,[18] reports of prior convictions,[19] and prejudicial statements by

[18] *Rideau*, 83 S. Ct. at 1419 (the community was exposed to "the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged"); *Irvin*, 81 S. Ct. at 1644 (reports that petitioner confessed to 24 burglaries).

[19] *Irvin*, 81 S. Ct. at 1644 ("reference[s] to crimes committed when a juvenile [and] his convictions for arson").

officials[20] are particularly suspect forms of pretrial publicity. However, the Supreme Court has held that reports of prior convictions do not give rise to a presumption of prejudice, rejecting the argument "that persons who have learned . . . of a defendant's prior criminal record are presumed to be prejudiced." *Murphy*, 95 S. Ct. at 2035. Also relevant to the Court's analysis of the content of any publicity is whether the information disseminated was part of the evidence presented at the trial. *Sheppard*, 86 S. Ct. at 1511 (a detective disclosed the results of tests that called the defendant's account of the facts into question; evidence of the tests was not submitted at trial); *Stroble v. California*, 72 S. Ct. 599, 604-05 (1952) (holding that the potential for prejudice resulting from publishing "extensive excerpts" from a defendant's confession was diminished by the fact that the "confession was read into the record at the preliminary hearing").

At Penry's second trial, the trial judge conducted an evidentiary hearing on the motion to change venue after the general jury voir dire ended. The trial court took judicial notice of that voir dire and of the voir dire held in Penry's competency trial. At the hearing on the motion to change venue, Penry presented the following evidence of pretrial publicity:

- The parties stipulated that the population of Walker County was approximately 55,206, of whom 8,670 were inmates. The number of

[20] *Irvin*, 81 S. Ct. at 1644 (the publicity reported the "determination . . . of the prosecutor to secure the death penalty" and the "promise of a sheriff to devote his life to securing petitioner's execution").

employees of the Texas Department of Criminal Justice employed in Walker County was 5,168, not all of whom lived in Walker County. The parties stipulated to the daily and Sunday circulations in Walker County of the *Houston Chronicle*, the *Houston Post*, and the *Huntsville Item*. The parties also stipulated to the audience shares of the television stations in Walker County; the number of homes in Walker County with television sets; the total number of households in Walker County; the total number of registered voters in Walker County; and the total number of employed residents of Walker County.

- Raymond Teske, Jr., an associate professor of criminal justice at Sam Houston State University in Huntsville, Texas, testified as to a telephone survey he conducted of one hundred Walker County residents. The survey revealed that 39% of the residents recognized Penry by name; an additional 25% of the residents did not recognize the case by name, but recognized one or more facts from the case; and 36% of the residents did not recognize the name or the facts of the case. Of the persons surveyed, 26% thought Penry was "definitely guilty" of the crime; an additional 30% thought he was "probably guilty"; and 44% were uncertain as to Penry's guilt. A total of 43% of those surveyed both recognized the case and thought Penry was definitely or probably guilty. Of the persons surveyed, 40% thought Penry should receive the death sentence. A total of 30% of those surveyed recognized the case, thought Penry was definitely or probably guilty, and should receive the death sentence. Professor Teske conducted the same survey in Galveston County and obtained lower figures in each of the above categories.

Professor Teske also testified that he did not believe an impartial jury could be impaneled because Walker County was "small and homogenous" and because many residents had ties to the Texas Department of Criminal Justice ("TDCJ"). Penry was imprisoned at the TDCJ unit in Huntsville.

- William Habern, a Hunstville, Texas defense attorney, testified that based on his conversations with Walker County residents, he believed that the "general consensus" of Walker County was that Penry "is guilty, that, the re-trial is a waste of time, and the fact that a more expedient thing to do is to go ahead and administer the death penalty." (S. F. Vol. 14, p. 1138).

- Kay Douglas, an attorney for the TDCJ in Huntsville, Texas, testified that based on her conversations with Walker County residents, she believed that the majority of Walker County residents believed that Penry was guilty. Douglas also testified that the large number of TDCJ employees living in Walker County made it likely that county residents were familiar with Penry and his case.

- Jane Swanson, an attorney for East Texas Legal Services in Huntsville, Texas, testified that based on her conversations with Walker County residents, she believed that it was the "general community's sentiments" that Penry was guilty and should not have received a retrial. (*Id.*, p. 1161). Swanson also testified that residents of Polk County, where

the murder was committed, often visited Walker County.

- Approximately seventy articles were published in the *Houston Post*, the *Houston Chronicle*, and the *Huntsville Item* about Penry's case. The articles spanned approximately the four years before the change of venue hearing.
- Videotapes and transcripts of at least six television newscasts about Penry's case were broadcast in Houston, Lufkin, and Bryan, Texas between 1988 and 1990. (*Id.*, pp. 1092-93).
- Edward Bronson, a professor of political science at California State University at Chico, testified that based on the distribution levels of the three newspapers, the number of articles in the two years preceding the change of venue hearing, and the "inflammatory" nature of many of the articles, it was "unlikely" that a fair and impartial jury for Penry's retrial could be selected in Walker County.

The prosecution presented the following evidence at the hearing:

- Oscar Thorn, the Walker County Tax Assessor and Collector, testified that based on his conversations with Walker County residents, he believed that Penry could receive a fair trial.
- Dale Myers, the Walker County Sheriff, testified that he believed, based on his conversations with Walker County residents, that Penry could receive a fair trial. Sheriff Myers

testified that there was little interaction between Polk and Walker counties.

- Randy Ellisor, general manager of the Huntsville cable television station, testified that he believed, based on his conversations with Walker County residents, that Penry could receive a fair trial.
- Ellisor testified that Polk County and Walker County did not enjoy a "special relationship or connection." (*Id.*, p. 1275).
- Rusty Davis, a Walker County insurance salesman, testified that he believed, based on his conversations with Walker County residents, that Penry could receive a fair trial.
- Travis McDonald, an assistant prosecutor for the TDCJ prison prosecution unit, who prosecuted crimes committed by incarcerated prisoners, testified that he prosecuted a murder case and an attempted murder case in Walker County in which the jury returned a not guilty verdict against an inmate. McDonald testified that TDCJ employees were on both jury panels. McDonald testified that in his experience, TDCJ employees impaneled as jurors in murder cases in Walker County "for the most part . . . tended to follow the law" and were unbiased against inmates. (*Id.*, p. 1291).
- Frank Robinson, a Walker County judge, testified that he believed, based on his conversations with Walker County residents, that Penry could receive a fair trial.

There was clearly extensive pretrial publicity regarding Penry's case in Walker County. In the nearly eleven

months before the venue hearing and after the Supreme Court reversed his conviction, approximately forty-two print articles mentioned Penry's case. In his survey, Professor Teske concluded that sixty-four percent of Walker County residents recognized the case. Fifty-two of the ninety venirepersons at the general jury voir dire recognized the case. During the individual voir dire examination, sixty-three of eighty-eight venirepersons recognized the case.

The nature of the reporting about Penry was mixed. A substantial majority of the reports were straightforward factual reporting. However, several inflammatory editorials and letters to the editor were also published. This material described Penry's crime in inflammatory language, highlighted Penry's future dangerousness, and downplayed or criticized Penry's mitigating evidence.

The articles described information that was, for the most part, included in the evidence presented at Penry's retrial. The articles referred to Penry's previous conviction. Some of the articles described Penry as a "killer," "murderer," or "death row inmate"; referred to Penry's confession; and referred to Penry's prior death sentence. At least one article noted that Penry had confessed to the killing in interviews given while on death row.

Against this conflicting evidence presented at the hearing, this court analyzes whether the state court could properly conclude that the quantity, quality, timing, nature, and content of the pretrial publicity did not create "a prejudice so great as to prevent a fair trial."

B. Voir Dire Rebuttal of Presumed Prejudice

In *Murphy v. Florida*, the Supreme Court confined the "presumed prejudice" standard first promulgated in *Rideau* to extreme circumstances. The Court stated:

> [*Rideau*, *Sheppard*, and *Estes*] cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process. To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair.

Murphy, 95 S. Ct. at 2036. The Fifth Circuit has interpreted *Murphy* and *Rideau* to permit the State to rebut a presumption of prejudicial publicity by reference to the voir dire proceedings. In *Mayola*, the court stated:

> "[U]nder the *Rideau* rule the trial court is not precluded from utilizing the *voir dire* to help gauge the intensity of community prejudice inspired by pre-trial publicity." Thus, even where the petitioner adduces evidence of widely disseminated, adverse publicity, the actual interrogation of members of the community on *voir dire* may belie the appearance of any pervasive community prejudice for example by demonstrating a general lack of credence in or familiarity with the prejudicial aspects of the publicity.

Mayola, 623 F.2d at 1000 (citation omitted). The *Mayola* court also held that the prosecution may rebut a showing of prejudice by proving that the "twelve jurors finally impanelled actually were impartial." *Id.* at 1000-01; *see*

also *OKeefe*, 722 F.2d at 1180; *Chagra*, 669 F.2d at 250. The *Mayola* court stated:

> Where, despite the existence of such hostile publicity, the state demonstrates that an impartial jury was actually impanelled, the fair trial guarantees of the Sixth and Fourteenth Amendments that the *Rideau* rule was articulated to protect will have been satisfied. Consequently, we believe the state should be accorded this opportunity to rebut the presumption of jury prejudice.

Mayola, 623 F.2d at 1001.

In concluding that its review of the voir dire did not "permit[ ] an inference of actual prejudice," *Murphy*, 95 S. Ct. at 2038, the *Murphy* Court observed that the voir dire "indicate[d] no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside." *Id.* at 2036; *see also Chagra*, 669 F.2d at 252-53; *Calley v. Callaway*, 519 F.2d 184, 206 (5th Cir. 1975). The Court also noted that another relevant factor was "the length to which the trial court must go in order to select jurors who appear to be impartial." *Murphy*, 95 S. Ct. at 2037; *see also Chagra*, 669 F.2d at 253 (concluding that the district court's voir dire procedure was "capable of giving 'reasonable assurance that prejudice would be discovered if present' " (quoting *United States v. Hawkins*, 658 F.2d 279, 283 (5th Cir. 1981))).

In *Irvin*, the Court cautioned:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case

> can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, 81 S. Ct. at 1642-43. The trial court judge's finding that a juror is capable of setting aside any "impression or opinion" is accorded great deference, particularly when a federal court is reviewing the findings of a state trial court. *See Mu'Min v. Virginia*, 111 S. Ct. 1899, 1903 (1991).[21] Such findings "should be set aside only where prejudice is 'manifest.' " *Irvin*, 81 S. Ct. at 1643 (quoting *Reynolds v. United States*, 98 U.S. 145, 156 (1878)). The Court explained the reason behind this deference to the trial court's findings of impartiality in *Rosales-Lopez v. United States*:

> The trial judge's function [in voir dire] is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and

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[21] The *Mu'Min* Court stated that "[w]e enjoy more latitude in setting standards for voir dire in federal courts under our supervisory power than we have in interpreting the provisions of the Fourteenth Amendment with respect to voir dire state courts." 111 S. Ct. at 1904.

> credibility by relying on their own evaluations of demeanor evidence and of responses to questions.

101 S. Ct. 1629, 1634 (1981).

After a review of the voir dire examination of both the venire and of the the jurors actually impaneled, this court finds that the respondent has successfully rebutted any presumption of prejudicial pretrial publicity. Fifty-two of the approximately ninety venirepersons had some knowledge of Penry's case. (S.F. Vol. 15, p. 128). The trial court struck seventeen of the ninety venirepersons for cause because they held the opinion that Penry was guilty.[22] *See Murphy*, 95 S. Ct. at 2037-38 (finding no constitutional violation due to prejudicial pretrial publicity when twenty of seventy-eight venirepersons were excused because they believed the defendant to be guilty). In Penry's competency trial, two of fifty-three potential jurors were struck because they could not be impartial based on their knowledge of the case. In contrast, ninety percent of the venire in *Irvin* stated that they could not be impartial. *Irvin*, 81 S. Ct. at 1645. The fact that seventeen of ninety people were so prejudiced against Penry as to require striking them from the panel for cause "by no means suggests a community with sentiment so poisoned against [Penry] as to impeach the

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[22] At general voir dire, the trial court excused three venirepersons because they were familiar with Penry's case and could not be impartial. (S.F. Vol. 15, pp. 73, 79, 93). Fourteen more venirepersons were struck for the same reason during individual voir dire.

indifference of jurors who displayed no animus of their own." *Murphy*, 95 S. Ct. at 2038.

The voir dire examination also makes it clear that the trial court employed procedures that gave "reasonable assurance that prejudice would be discovered if present." *Hawkins*, 658 F.2d at 283 (quoting *United States v. Delval*, 600 F.2d 1098, 1102 (5th Cir. 1979)). The juror questionnaires required each venire person to disclose any familiarity with the facts of the case and any memory of television or newspaper coverage of the case. The trial court allowed counsel to voir dire the venire as a whole. During the general voir dire, the court asked how many of the venire had heard of or read about the case. The court told the venireperson that anything they may have heard about the case was not evidence and asked whether any venireperson would be unable to ignore the publicity he had heard. The court permitted the prosecutor to ask again how many of the venirepersons had heard of the case. *See Chagra*, 669 F.2d at 253 n.15 ("The use of . . . collective questions to identify the individuals possibly having knowledge about the case followed by a separate examination of each such individual is entirely acceptable."); *Capo*, 595 F.2d at 1091 (approving use of the same procedure).

The individual voir dire examinations, conducted outside the presence of other venirepersons, were thorough and extensive. The individual voir dire examinations of the approximately ninety venirepersons was conducted on twenty-one separate days. *See Yount*, 104 S. Ct. at 2890 n.10 (describing the voir dire as "particularly extensive" when ten days were used to question 167 venirepersons); *Capo*, 595 F.2d at 1092 (noting that the

"arduous" voir dire took ten days for seventy-three venirepersons). Many of these days were devoted exclusively to voir dire. The individual voir dire examinations filled close to 6,000 pages of transcript. *See United States v. Harrelson*, 754 F.2d 1153, 1160 (5th Cir. 1985) (noting that the voir dire lasted seven days and filled over 2,000 pages of transcript).

The judge, prosecutor, and defense counsel questioned each venireperson repeatedly and at length about the extent of his or her knowledge of the case, the effect of that knowledge, and his or her ability to be fair and impartial. *See Calley*, 519 F.2d at 209 (noting that "importantly, both defense counsel and the prosecution were allowed almost unlimited freedom to inquire into the [military] court members' attitudes, perceptions, backgrounds and the nature and extent of their exposure to pretrial publicity"); *see also Harrelson*, 754 F.2d at 1160. This method tracked the procedures the Fifth Circuit recommended in *Chagra* for cases in which pretrial publicity is extensive:

> [A] district court should determine which, if any, panel members may have had some knowledge of or attitudes about the case from pretrial publicity and should examine each such panel member outside the presence of the remaining panel members and the venire with an eye towards discovering the depth and breadth of that knowledge or attitude rather than as a means of educating him about his responsibilities as a juror. The district court should then make an independent determination whether the panel member can and will be impartial.

Chagra, 669 F.2d at 253 n.14 (citing *United States v. Davis*, 583 F.2d 190, 196-97 (5th Cir. 1978)); *see also Capo*, 595 F.2d at 1091-92; *Calley*, 519 F.3d at 208-09.

Finally, none of the twelve jurors actually impaneled possessed a significant amount of knowledge about the inflammatory facts of the case. None of the twelve jurors had any doubt about his or her ability to be impartial.

- Jurors William Franz and Thomas Roberts had never heard of Penry and knew nothing about the case. Juror Lloyd Davis had read "a little bit" about the case in the newspaper but had "forgotten what that even said." (S.F. Vol. 18, p. 959). Davis had no opinion about the case and stated that he could be impartial.

- Juror Gary Dean McClure had read "a little bit" about the case in one newspaper article and had heard a few facts about the case in conversations. (S.F. Vol. 20, pp. 1283, 1328-29). McClure stated that he "really [didn't] know that much about [the case]" and that he "really kn[e]w nothing about it." (*Id.*, p. 1283). McClure had no opinion about the case and stated that he could be impartial.

- Juror David Moreno had heard "some conversations" about the case and had read one newspaper article "some time ago" about the case. (S.F. Vol. 22, p. 1760). The only fact he could remember about the case was that Penry was on death row and "this case was on appeal due to some question on the mental retardation or something to that effect. That is about all I can remember." (*Id.*; *see*

also id., p. 1797). Moreno had no opinion about the case and stated that he could be impartial.

- Juror Forest Marler had only heard Penry's name "on the news or something." (S.F. Vol. 23, p. 1999). He knew none of the facts of the case and "couldn't remember any details on anything." (*Id.*). Marler had no opinion about the case and stated that he could be impartial.

- Juror Mary Yarbrough had heard on television only that "there was a killing in Livingston." (*Id.*, p. 2140). Yarbrough stated that she knew nothing "about the history of the case." (*Id.*, p. 2146). Yarbrough "heard that it happened, and that is all I know about it." (*Id.*, p. 2187). Yarbrough had no opinion about the case and stated that she could be impartial.

- Juror Diane Wood had read about the case in an article in the *Houston Chronicle*. Wood knew that the Supreme Court had reversed Penry's sentence and that Penry would be retried. (S.F. Vol. 24, p. 2368). Wood admitted that she at first felt "angry" when she read that Penry's sentence had been overturned. (S.F. Vol. 32, p. 4492). However, Wood stated that she had felt anger toward the "law," not Penry, with respect to the reversal. (*Id.*, p. 4493). Wood also stated that her anger had been because "maybe it wasn't done right the first time in trial" and that the error would be the fault of "the court." (*Id.*, pp. 4493-94). Wood also stated that she would not "feel any different" about the case knowing that Penry had been tried before. (S.F. Vol. 24, p.

2368). Wood stated that she would give Penry a presumption of innocence and could be impartial.

- Juror Machere Gillaspie had heard after the general voir dire only that Penry was incarcerated. Gillaspie did not know when Penry had been incarcerated or what crime he had committed. Gillaspie had no opinion about the case and stated that she could be impartial.

- Juror Earl Fountain had read an article in the *Huntsville Item* regarding the scheduled start of Penry's retrial. Fountain stated that "the only thing I have heard about it, is what little I read in the paper about them not letting – they didn't want the press printing anything about it, or what you all said up there at the courthouse. I don't remember reading anything about it in the paper." (S.F. Vol. 28, p. 3375). Fountain's wife had also told him that Penry "was this guy from Livingston or something that killed a woman or something, that's about all that we really talked about." (*Id.*). Fountain had no opinion about the case and stated that he could be impartial.

- Juror Douglas Massey's father had served on the jury in Penry's competency trial. Massey's father told him only "very general things" about the facts of the case. (S.F. Vol. 34, p. 366-A). Massey had also read an article in the *Houston Chronicle* about the case and was familiar with the basic procedural history of the case and the circumstances of the crime. Massey stated that the fact that Penry

had been previously convicted and sentenced to death would not affect his deliberations. Massey stated that he had no opinion about the case and that he could be impartial.

- Juror Mark McElligott stated that he "may have seen the headlines in the paper," but did not read any articles about the case and knew none of the facts of the case. (S.F. Vol. 35, p. 753-A). McElligott stated that he had no opinion about the case and could be impartial.

Penry challenged only two of the jurors for cause. (Trans. Vol. 3, pp. 636, 659). Both challenges were unsuccessful; neither challenge was related to these jurors' knowledge of Penry's case. *See Chagra*, 669 F.2d at 252-53 (noting that none of the impaneled jurors was challenged for cause). Although a few of the jurors arguably were familiar with some of the facts of the case, none of the jurors gave any hint that knowledge of these facts would predispose him or her against Penry. *See Murphy*, 95 S. Ct. at 2036 n.4 ("We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him. . . . "); *Calley*, 519 F.2d at 207 (noting that none of the jurors "stated that he had formed an opinion as to the guilt or innocence of Calley"). None of the jurors expressed any doubt that he or she could be impartial. *See Chagra*, 669 F.2d at 252 (noting that the one juror who had any familiarity with the case stated that she was not biased); *Calley*, 519 F.2d at 207 ("All court members stated that their decision would not be influenced by any of the publicity with which they had been in contact."). The trial court is entitled to "great deference" in determining that

a venireperson accurately states that he or she can be impartial.

Only one juror, Douglas Massey, was familiar with any of the "inflammatory" facts of the case. Massey clearly and repeatedly stated that this knowledge would not affect his deliberations and that he could be impartial. *See Mayola*, 623 F.2d at 1001 ("[A] showing that none of the twelve jurors impanelled had ever been exposed, first or second hand, to the inflammatory publicity, would probably suffice to negate the presumption of prejudice flowing from that publicity."). As in *Murphy*, the individual voir dire of the actual jurors does not "indicate . . . such hostility to [Penry] . . . as to suggest a partiality that could not be laid aside." 95 S. Ct. at 2036.

The Court of Criminal Appeals' determination that Penry was not unconstitutionally prejudiced by pretrial publicity is not an unreasonable application of clearly established Supreme Court authority. This court DENIES Penry's claim that the trial court's denial of his motion to change venue violated his constitutional rights.

XIII. The Prosecution's Definition of "Mitigating" During the Voir Dire (Claim XI)

During voir dire, the prosecution described "mitigating circumstances" as circumstances that reduce a defendant's "blame" for the crime. Penry objected to this description of mitigating circumstances as a misstatement of law. (S.F. Vol. 23, p. 1925; S.F. Vol. 25, p. 2478; Trans. Vol. 3, p. 570). On direct appeal, the Texas Court of Criminal Appeals rejected Penry's claim, noting that "defense counsel had the opportunity to cross-examine

each veniremember regarding the meaning of mitigating [and] the trial court instructed each juror prior to his individual voir dire that anything the attorneys said could not be considered as evidence, and also defined the term 'mitigating' in the court's charge." *Penry*, 903 S.W.2d at 741. The issue is whether the appellate court's determination that any error in the prosecutor's statement was harmless is an unreasonable application of clearly established federal law.

In *Lockett v. Ohio*, the Supreme Court defined mitigating evidence as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 98 S. Ct. at 2965. This court, assumes, without deciding, that the prosecutor's description of mitigating circumstances was inconsistent with *Lockett*. Defense counsel had an opportunity to cross-examine each of the prospective jurors as to the meaning of "mitigating" and to give the proper definition. In addition, the judge, as well as the prosecutor and defense counsel, repeatedly told the prospective jurors that the attorneys' statements during voir dire were not instructions on the law. The trial court charge to the jury defined "mitigating," giving a definition consistent with *Lockett*.

The charge stated, in pertinent part:

> A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue.

(Trans. Vol. 5, p. 1329). The Supreme Court made it clear that "arguments of counsel generally carry less weight with a jury than do instructions from the court. . . . Arguments of counsel which misstate the law are subject to objection and to correction by the court." *Boyde v. California*, 110 S. Ct. 1190, 1200 (1990) (citations omitted).

This court concludes that any error resulting from the prosecution's statement was harmless. Under *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993), the prosecution's description of mitigating circumstances did not have a "substantial and injurious effect" on the jury's verdict. The Court of Criminal Appeals' ruling was not an unreasonable application of federal law. Penry's claim that his constitutional rights were violated by the prosecution's description of mitigating circumstances to prospective jurors is DENIED.

XIV. The Sentencing Charge (Claim XII)

A. The Failure to Define "Personal Culpability"

Penry argues that the trial court erred by instructing the jury that the mitigating evidence had to be relevant to his "personal culpability," without defining the term.

The relevant portions of the sentencing charge stated:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give

> effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

(Trans. Vol. 5, p. 1329). Penry argues that the trial court's use of the term "personal culpability," without a definition, did not make it clear that Penry's mitigating evidence may have properly lessened his "overall moral culpability" without necessarily reducing his blame for the crime itself. Penry states:

> Absent an instruction that clearly defined "personal culpability" so as to fully include, not restrict, the scope of Penry's mitigating circumstances, the jury was reasonably likely to conclude that "personal culpability" required that mitigating circumstances directly reduce Penry's blame for the crime itself.

(Docket Entry No. 18, p. 88). Penry argues that the prosecutor's closing argument compounded the error in the charge. The argument emphasized that Penry had not shown a connection between his crime and his mental retardation and background of childhood abuse. The Texas Court of Criminal Appeals rejected Penry's claim based on state court precedent approving virtually identical instructions. *Penry*, 903 S.W.2d at 765.

The standard for determining whether jury instructions adequately permit the jury to consider and give

effect to mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Buchanan v. Angelone*, 118 S. Ct. 757, 761 (1998) (quoting *Boyde*, 110 S. Ct. at 1198). Penry argues that the jury was reasonably likely to interpret the term "personal culpability" to prevent consideration of evidence that would not "directly reduce Penry's blame for the crime itself." This court assumes for the purpose of this petition that the jury was reasonably likely to interpret "personal culpability" to prevent consideration of this evidence. The issue is whether this evidence is "constitutionally relevant" mitigating evidence.

In *Penry* I, the Supreme Court approved the use of the term "personal culpability" with reference to mitigating evidence. The Court noted that a jury must be able to consider and give effect to mitigating evidence "because the punishment should be directly related to the *personal culpability* of the defendant." *Penry* I, 109 S. Ct. at 2951 (emphasis added). Penry is correct that in *Lockett*, the Supreme Court defined mitigating evidence as "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett*, 98 S. Ct. at 2964. In post-*Lockett* cases, however, the Court clarified that "constitutionally relevant" character evidence is evidence causally linked to the defendant's crime.

In *Penry* I, the Supreme Court noted that mitigating evidence must be considered in a sentencer's "individualized assessment of the appropriateness of the death penalty" because

> of the belief, long held by this society, that defendants who commit criminal acts *that are attributable to* a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry I, 109 S. Ct. at 2947 (emphasis added) (quoting *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring)).

The Fifth Circuit has interpreted *Penry* I to require that "constitutionally relevant" mitigating evidence shows that the defendant's "criminal act was attributable to [his] severe permanent condition." *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995) (citations omitted). "[F]or evidence to have mitigating relevance to the special issues, there must be a *nexus* between the mitigating evidence and the criminal act." *Id.* at 461 (emphasis added); *see also Turner v. Johnson*, 106 F.3d 1178, 1189 (5th Cir. 1997); *Harris v. Johnson*, 81 F.3d 535, 539 & n.11 (5th Cir. 1996); *Allridge v. Scott*, 41 F.3d 213, 223 (5th Cir. 1994); *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994); *Russell v. Collins*, 998 F.2d 1287, 1292 (5th Cir. 1993).

Penry cites *Skipper v. South Carolina*, 106 S. Ct. 1669 (1986), in support of his argument. In *Skipper*, the Supreme Court held that a sentencing jury may not be precluded from considering a defendant's evidence that he had exhibited good behavior during his pretrial detention. The Court noted: "Although it is true that any [favorable] inferences [from the defendant's evidence] would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than

death.' " *Id.* at 1671 (citation omitted) (quoting *Lockett*, 98 S. Ct. at 2965). Penry cites this statement as support for his argument that constitutionally relevant mitigating evidence need not be causally linked to a defendant's culpability for his crime.

In *Skipper*, however, the mitigating evidence tended to show that the defendant would not pose a danger in the future. The Court noted that "the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison." *Id.* The Court continued:

> Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."

Id. (quoting *Jurek v. Texas*, 96 S. Ct. 2950, 2958 (1976) (plurality opinion)).

In *Franklin v. Lynaugh*, 108 S. Ct. 2320 (1988), the Court discussed *Skipper* in the context of the Texas special issues. The petitioner in *Franklin* argued that the Texas special issue on "future dangerousness" did not permit the jury to consider and give effect to evidence of his good disciplinary record during his incarceration. Citing *Skipper*, the petitioner argued that the "future dangerousness" special issue did not allow the jury "to give 'independent' mitigating weight to his prison record . . . as a reflection on his 'character.' " *Id.* at 2329. The Court rejected this argument. The Court held that the petitioner's mitigating evidence was relevant only as it

related to his potential for future dangerousness. The Court limited its holding in *Skipper* to situations in which the defendant's proffered mitigating character evidence shows a lack of future dangerousness:

> [O]ur discussion in *Skipper* of the relevancy of such disciplinary record evidence in capital sentencing decisions dealt exclusively with the question of how such evidence reflects on a defendant's likely future behavior. Nothing in *Skipper* suggests that such evidence has any further relevancy with respect to a defendant's "character" or with respect to the punishment decision.

Id. at 2329-30 (citation omitted). *Skipper* does not stand for the proposition that evidence unrelated to the defendant's future dangerousness or his crime is constitutionally relevant mitigating evidence.

This court recognizes the tension between cases such as *Skipper* and *Franklin*, which acknowledge that relevant mitigating evidence includes evidence that the defendant will not be a danger in the future, and the post-*Penry* I line of cases, which require relevant mitigating evidence to have a nexus to the crime itself. Evidence regarding the defendant's present lack of future dangerousness may or may not have a "nexus" to the defendant's crime. A defendant could not, for example, argue that his crime was "attributable to" his lack of future dangerousness.

This tension appears to result from the fact that the Supreme Court allows states to channel the sentencer's discretion through consideration of whether "aggravating factors" are present, such as a defendant's future dangerousness. *Jurek*, 96 S. Ct. at 2956-57. A defendant is entitled

to respond to evidence of his future dangerousness with evidence of his lack of future dangerousness. In such cases, "constitutionally relevant" mitigating evidence does include evidence of the lack of future dangerousness. The Fifth Circuit has implicitly accounted for this necessity in stating that constitutionally relevant mitigating evidence does not include "evidence unrelated to a defendant's culpability *or capacity for rehabilitation.*" *Barnard v. Collins*, 958 F.2d 634, 640 (5th Cir. 1992) (emphasis added) (citing *Skipper*, 106 S. Ct. at 1671). However, no Supreme Court or Fifth Circuit precedent supports Penry's argument that evidence of his mental retardation and childhood abuse, that was not shown to have a nexus to his crime or to relate to his future dangerousness, is "constitutionally relevant" mitigating evidence.

Penry has not shown that the jury was reasonably likely to have interpreted the term "personal culpability" to prevent consideration of constitutionally relevant mitigating evidence.[23]

The Court of Criminal Appeals' denial of Penry's claim was neither contrary to, nor an unreasonable application of, *Skipper* or other clearly established Supreme Court authority.

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[23] Penry offers no other explanation as to how the trial court's use of the term "personal culpability," without a definition, may have unconstitutionally restricted the jury's consideration of his mitigating evidence.

B. Inclusion of a "No Sympathy" Instruction

The sentencing charge stated in part:

> You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issues.

(Trans. Vol. 5, p. 1329). Penry argues that because of this instruction, it was reasonably likely that the jurors did not consider mitigating evidence that may have evoked compassion for Penry without excusing his crime. The Court of Criminal Appeals denied this claim based on Texas precedent. *Penry*, 903 S.W.2d at 766.

The Supreme Court has squarely held that a trial court may instruct the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" in making its sentencing decision, even if the defendant's mitigating evidence evokes sympathy. *California v. Brown*, 107 S. Ct. 837, 839-40 (1987); *see also Johnson v. Texas*, 113 S. Ct. 2658, 2671 (1993) ("[W]e have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant."); *Saffle v. Parks*, 110 S. Ct. 1257, 1259, 1263-64 (1990) (approving an instruction telling the jurors that they "must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence"). The Court has also ruled that a holding that a "no sympathy" instruction is unconstitutional would create a new rule

under *Teague v. Lane*, 109 S. Ct. 1060, 1067-68 (1989) (plurality opinion).[24] *See Saffle*, 110 S. Ct. at 1261.

Penry attempts to distinguish his argument from those the Court rejected in *Brown* and *Saffle*. Penry asserts that the combination of the trial court's "no sympathy" instruction with the trial court's "confusing" instruction on how to give effect to the mitigating evidence made it reasonably likely that the jurors failed to consider the constitutionally relevant mitigating evidence Penry introduced. However, Penry does not explain how the court's mitigating evidence instruction, which told the jurors how to *give effect* to Penry's mitigating evidence, was likely to suggest to the jury that they could not *consider* Penry's relevant evidence. Penry has not shown that the combination of these two instructions made it reasonably likely that the jury failed to consider his constitutionally relevant mitigating evidence. The Court of Criminal Appeals' rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

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[24] In *Teague*, the Court held that a federal habeas Court must determine whether the relief sought by the petitioner would create a "new rule." If so, the Court may not announce or apply the new rule unless: (1) the "rule places a class of private conduct beyond the power of the State to proscribe, or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' " *Saffle*, 110 S. Ct. at 1263 (alternation in original) (citing *Teague*, 109 S. Ct. at 1075 (quoting *Penry*, 109 S. Ct. at 2953); or (2) the rule is a " 'watershed rule[ ] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 1264 (citing *Teague*, 190 S. Ct. at 1076). Neither exception applies in this case.

C. The Burden of Proof Instruction

Penry argues that the sentencing charge failed to instruct the jurors that the State had the burden to prove, beyond a reasonable doubt, that Penry's mitigating evidence did not warrant a sentence less than death. The trial court gave the jurors the following burden of proof instructions:

> The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes," all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes."

(Trans. Vol. 5, p. 1326). The sentencing charge did not specifically instruct the jury that the State had the burden to prove that Penry's mitigating evidence did not warrant a life sentence.

Penry did not present this argument to the Texas state courts. A petitioner fails to exhaust state remedies when he does not give the state courts a "fair opportunity" to apply controlling legal principles to his habeas claims. *Anderson v. Harless*, 103 S. Ct. 276, 277 (1982). In his brief on direct appeal to the Texas Court of Criminal Appeals, Penry relied solely on provisions of the Texas Code of Criminal Procedure to support his claim, and made no reference to federal constitutional violations. (Brief for Appellant at 267, *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995) (No. 71, 130)). Penry's claim is therefore procedurally barred. *Nobles*, 127 F.3d at 423.

Penry does not argue that an exception to the procedural bar applies.

Penry's claim fails on the merits as well. "[A] defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton v. Arizona*, 110 S. Ct. 3047, 3055 (1990). This court DENIES Penry's challenges to the jury instructions in the sentencing charge.

XV. The Challenge to the Competency Trial (Claim XIII)

(A) The Failure to Define Terms in the Jury Charge

In the competency trial, the judge gave the jury a charge that defined "incompetent to stand trial" as follows:

> A person is incompetent to stand trial for an offense if he does not have:
>
> (a) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or
>
> (b) a rational as well as factual understanding of the proceeding against him.

(Trans. Vol. 1, p. 196). The charge did not define the terms "reasonable," "rational," or "understanding." Penry timely objected to the charge and tendered an instruction. Penry's requested instruction defined the phrase "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" as: "the

defendant has enough knowledge and intelligence to understand and respond to the words used by the court, the state's attorneys, his own attorneys, and the witnesses that he is able to participate in the trial in a meaningful way." (*Id.*, pp. 182, 192-93). Penry argues that the failure to define these terms made the charge unconstitutionally vague.

The Texas Court of Criminal Appeals cited the proper Supreme Court standard and denied this claim. *Penry*, 903 S.W.2d at 729-30. The Texas appellate court noted that the Supreme Court has not required that a court specifically explain these terms to a jury; the terms at issue are not "so technical that they are legal terms of art." *Id.* at 730.[25]

The trial court's definition of "incompetent to stand trial" tracked the Supreme Court's standard in *Dusky v. United States*, 80 S. Ct. 788, 789 (1960): "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." Penry argues that the trial court should have defined the phrase beginning "sufficient present ability" because Penry was on trial for capital murder and his competency was a very close issue.

Penry was not entitled to definitions of "reasonable," "rational," or "understanding," solely because his was a

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[25] Respondent's argument that this claim is barred as part of a "second or successive" petition fails because the current petition attacks only the 1990 conviction.

capital case. The Supreme Court and the Fifth Circuit have repeatedly approved the *Dusky* instruction, without additional definitions, in capital cases. *See, e.g., Godinez v. Moran*, 113 S. Ct. 2680, 2685 (1993); *Moody v. Johnson*, 139 F.3d 477, 481 (5th Cir. 1998); *Carter v. Johnson*, 131 F.3d 452, 459 (5th Cir. 1997).

This court rejects Penry's argument that a different instruction was necessary because his was a close case in which the jurors were predisposed to disfavor his "mental defense." (Docket Entry No. 18, p. 95). Penry cites no federal cases holding that additional clarification of the terms in the *Dusky* instruction is required, even in a capital case, because the evidence of incompetence is disputed or conflicting. Other than the evidence Penry cites in support of his change of venue claim, Penry offers no evidence that the jurors in his competency trial were predisposed against his attempt to show that he was incompetent to stand trial. As discussed more fully below, the trial court's failure to change the venue for his competency trial did not unconstitutionally prejudice Penry.

The state court's denial of Penry's claim that the trial court erred by failing to instruct the competency trial jurors as to the meaning of "reasonable," "rational," and "understanding," was not contrary to the Supreme Court's decision in *Dusky* or other clearly established federal law.

B. The Failure to Clarify the Effect of a Finding of Incompetence

Penry argues that the trial court erred in failing to advise the jury that a finding of incompetence would not preclude a trial and conviction should Penry become competent to stand trial in the future. Penry argues that such an instruction was necessary to counteract the prosecution's argument that Penry was "dangerous" and the implication that Penry would return to society if he were found incompetent.

The Court of Criminal Appeals found this argument to be procedurally defaulted because Penry failed to object at trial on constitutional grounds to the court's refusal to submit his requested instruction. *Penry*, 903 S.W.2d at 729. The Court of Criminal Appeals has held that "[a]n objection stating one legal theory may not be used to support a different legal theory on appeal." *Johnson v. State*, 803 S.W.2d 272, 292 (Tex. Crim. App. 1990), *overruled on other grounds by Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991); *see also Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986) ("[I]f an objection made in the trial court differs from the complaint made on appeal, a defendant has not preserved any error for review."). Texas's contemporaneous objection rule is an independent and adequate state procedural bar. *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998). Penry has procedurally defaulted this claim. He does not argue that he meets any of the exceptions to the procedural default bar.

This court also notes that Penry has failed to cite, and this court has not discovered, any case law supporting

Penry's position that his requested competency instruction was constitutionally required. Habeas relief based on this claim is not available from this court.

C. Failure to Change the Venue of the Competency Trial

Penry argues that the trial court erred in denying his motion to change the venue of the competency trial. Penry argues that pretrial publicity about his case made the venire at his competency trial presumptively biased. The Court of Criminal Appeals discussed the evidence presented at the venue hearing in the competency trial and denied Penry's claim. That court found insufficient evidence that Penry could not obtain a fair competency trial because of pretrial publicity. *Penry*, 903 S.W.2d at 726-27.

At the hearing on his motion for change of venue, Penry presented approximately thirty-one newspaper articles, editorials, or letters to the editor about his case from the *Houston Chronicle*, *Houston Post*, *Dallas Times Herald*, and the *Huntsville Item*. Most of the articles appeared in 1989 and 1990. Penry also presented the testimony of Hal Ridley, a criminal defense lawyer practicing in Walker County, who stated that he believed Penry could not receive a fair competency trial. Ridley based his testimony on Penry's publicized status as a death row inmate and the number of TDCJ employees who would likely be in the jury pool. Ridley testified that TDCJ employees tend to believe that "any kind of a mental claim is, you know, put on," and that TDCJ employees are careful not to let themselves get "conned"

by inmates. (S.F. Vol. 9, p. 410). Ridley also testified that the newspaper articles prejudiced Penry because they attributed quotes to Penry which a reader would identify with competency to stand trial. The trial court also took judicial notice of the competency trial voir dire.

Respondent argues that the trial court did not violate Penry's constitutional rights by denying the motion to change venue because Penry had no constitutional right to a competency trial at all, noting that the Supreme Court reversed only Penry's sentence. Respondent also argues that Penry's competency was determined before his 1980 trial and that Penry's "mental retardation is not the type of competency issue that is subject to change over time." (Docket Entry No. 20, p. 68).

This court assumes, for the purpose of this petition, that Penry had a constitutional right to a competency trial free from prejudicial pretrial publicity and that the *Irvin* line of pretrial publicity cases applies. Penry has made no showing that the pretrial publicity surrounding his case created "an 'extreme situation' of inflammatory pretrial publicity that literally saturated the community in which his trial was held." *Chagra*, 669 F.2d at 251. Penry made no showing that the articles he cites had any effect on the ability of jurors from Walker County to judge his competency fairly. Penry offered only speculation that the articles would convey information relevant to the public's perception of his competency. Penry also presented no evidence, other than Hal Ridley's testimony, of the "degree of community exposure to the prejudicial content of the offensive news coverage." *Mayola v. Alabama*, 623 F.2d 992, 998 (5th Cir. 1980).

Even if Penry had made a showing sufficient to establish a presumption of partiality, respondent has successfully rebutted the presumption through the voir dire examination at the competency trial. The venire consisted of approximately fifty-three persons. The trial court asked the venire as a whole if anyone had heard of the case. Although the record is unclear, it appears that between twenty and twenty-five venirepersons answered "yes." The court asked those venirepersons if anything they had heard about the case "would cause you a problem, have your mind made up one way or the other." (S.F. Vol. 7, p. 62). Two venirepersons answered this question in the affirmative. The court excused both of these venirepersons for cause.

The trial court then conducted a thorough individual voir dire examination of each of the venirepersons who indicated some knowledge about the case. Outside the presence of the venire, the trial court and counsel questioned each of these venirepersons about the extent of his or her knowledge of the case and his or her opinion regarding mental retardation. The court asked all of these venirepersons if they could be fair and impartial. This procedure gave "reasonable assurance that prejudice would be discovered if present." *Chagra*, 669 F.2d at 253 nn.14-15; *see also Capo*, 595 F.2d at 1091-92; *Calley*, 519 F.2d at 208-09.

Moreover, none of the twelve jurors actually impaneled had knowledge of Penry's case beyond the fact that Penry was mentally retarded and had previously been sentenced to death. Each of the jurors affirmed that he or she could be fair and impartial. *See Murphy*, 95 S. Ct. at 2036 n.4; *Chagra*, 669 F.2d at 252; *Calley*, 519 F.2d at 207.

This court DENIES Penry's claim that the trial court's denial of his motion to change the venue of the competency trial violated his constitutional rights.

XVI. The Trial Court's Admission of Evidence Containing Hearsay (Claim XIV)

During the sentencing phase of Penry's trial, the trial court admitted into evidence several of Penry's medical records, over Penry's objection. Portions of the records contained references to Penry's attempts to commit arson when he was a teenager and his alleged homosexual behavior.[26] Penry argues that the trial court erred in admitting these records into evidence because the records contained hearsay and deprived him of his Sixth Amendment right to confront adverse witnesses. Penry also argues that some of the records contained statements he made during a psychiatric examination, violating *Estelle v. Smith*.

The Texas Court of Criminal Appeals rejected Penry's Sixth Amendment argument. The court held that Penry's Sixth Amendment rights were not violated because the out-of-court statements were corroborated by other evidence and because the statements bore sufficient indicia of reliability to be admissible. *Penry*, 903 S.W.2d at 761-62.

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[26] The records include State's exhibits 91-A, 95-C, 96-A, 96-B, 97-A, 99, 99-A, 99-B, 101-A, 102, and 102-A. (S.F. Vol. 49, pp. 1407-37).

Respondent does not deny that the records contain hearsay.[27] "[T]he [Confrontation] Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause." *Idaho v. Wright*, 110 S. Ct. 3139, 3145 (1990). "The wrongful admission of hearsay evidence violates the Confrontation Clause only when the evidence was a 'crucial, critical or highly significant factor in the framework of the whole trial.' " *Gochicoa v. Johnson*, 118 F.3d 440, 446 (5th Cir. 1997) (quoting *Cupit v. Whitley*, 28 F.3d 532, 537 (5th Cir. 1994)). This court must consider five factors in determining whether hearsay evidence was "crucial, critical or highly significant":

(1) whether the hearsay evidence was "crucial" or "devastating";

(2) whether prosecutors misused a confession or otherwise engaged in misconduct;

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[27] Respondent appears to argue that Penry waived his rights under the Confrontation Clause because he offered portions of the records during the competency and punishment phases of the trial. The parties stipulated before the guilt/innocence phase of the trial that the medical records introduced at Penry's competency trial did not require authentication by a business records custodian. (S.F. Vol. 41, pp. 51-52). However, Penry reserved objections to the documents based on relevance and hearsay. (*Id.*, pp. 50, 53). Penry did not waive his rights under the Confrontation Clause to object to hearsay statements.

Respondent also argues that Penry's claim is barred by the doctrine of judicial estoppel and that the prosecution was entitled to introduce the records under Tex. R. Evid. 106. Because this court upholds the Court of Criminal Appeals' decision on the merits, it does not reach these arguments.

(3) whether a joint trial or the wholesale denial of cross-examination was involved;

(4) whether the most important prosecution witness, as well as other prosecution witnesses, was available for cross-examination; and

(5) the degree to which the hearsay evidence is supported by "indicia of [its] reliability."

Id. (citing *Cupit*, 28 F.3d at 532).

"[T]he most important of the five factors are the first and the fifth." *Id.*; *see also United States v. Cheramie*, 51 F.3d 538, 541 (5th Cir. 1995) ("Hearsay evidence is inadmissible under the confrontation clause unless it can be shown that the declarant is unavailable to testify and that the hearsay evidence is supported by adequate indicia of reliability."). With respect to the first factor, "[t]he determination of whether the evidence is 'crucial' or 'devastating,' . . . recognizes that the erroneous admission of unreliable hearsay may nonetheless be harmless in light of other evidence at trial." *Gochicoa*, 118 F.3d at 447. This factor "simply restates the harmless error rule." *Id.* at 447 n.5 (citing *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1103 n.6 (5th Cir. 1981)). With respect to the fifth factor, "[a] statement of an unavailable witness is sufficiently reliable only if it falls within a firmly rooted exception to the hearsay rule or if it carries particularized guarantees of trustworthiness." *Id.* at 446-47.

The Court of Criminal Appeals found that the hearsay statements contained in Penry's medical records were corroborated by other evidence at trial. The statements regarding Penry's attempts at arson were corroborated by

testimony from Patsy Ross and Dr. Quijano. (*Id.*, pp. 1228-29, 1237-38; S.F. Vol. 50, pp. 1636-37). The objectionable hearsay statements in Penry's medical records were not "crucial" or "devastating" under the *Gochicoa* standard.

The Court of Criminal Appeals found that the hearsay statements were reliable because they

> were made many years ago by [Penry's] family, doctors, and nurses in the context of [Penry's] medical treatment, and not in the context of this criminal proceeding. . . . [T]he declarants had no obvious motive for bias against [Penry] and in many cases described the events while they were fresh on their minds.

Penry v. State, 903 S.W.2d at 762. The state court concluded that these factors gave the hearsay statements "particularized guarantees of trustworthiness."[28]

The state court's denial of Penry's Confrontation Clause claim was not an unreasonable application of clearly established federal law. Penry did not present his *Estelle v. Smith* claim to the Texas courts. It is now barred as an abuse of the writ. *See Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1845 (1998).

This court DENIES Penry's claim that the admission of medical records containing hearsay violated his Fifth and Sixth Amendment rights.

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[28] The three other factors listed in *Gochicoa* also support the state court's conclusion.

XVII. The Constitutionality of the Texas Clemency Procedures (Claim XV)

In Texas, the governor may, in his discretion, grant clemency in the form of a temporary reprieve, commutation of punishment, or a pardon, on the nonbinding recommendation of the Texas Board of Pardons and Paroles (the "Board"). TEX. CONST. art. IV, § 11(b); *see also* TEX. CODE CRIM. PROC. art. 48.01.[29] The Board makes clemency recommendations in capital cases based on a majority vote. 37 TEX. ADMIN. CODE § 141.3. The Board is not required to meet in person to vote on a clemency application. Board members are not required to vote on each application. The Texas Administrative Code, which sets out provisions establishing the Board and its procedures, does not set objective criteria for the Board to apply in determining whether to recommend commutation of a death sentence. *Id.* § 143.57. The Board's chairman stated in December 1997 that the Board had not established internal guidelines to guide the members' discretion in capital clemency cases. The chairman reportedly stated: "Each board member decides individually on what basis to recommend or deny action." Stefanie Asin & Kathy Walt, *Execution of Tucker Scheduled for Feb. 3*, HOUS. CHRON., Dec. 19, 1997, at A1.

Penry argues that the governor of Texas has articulated an "extra-statutory" clemency policy in which he

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[29] The governor may grant one thirty-day reprieve of execution without the Board's recommendation. 37 TEX. ADMIN. CODE § 143.41(a). The governor may not grant a commutation or pardon without the Board's recommendation. *See id.* §§ 143.1, 143.51.

will grant clemency only if there is doubt as to the defendant's guilt or if the defendant has been deprived of fair access to the courts on "all outstanding legal issues." (Docket Entry No. 18, p. 113) (citing Asin & Walt, *Execution of Tucker Scheduled for Feb. 3*, at A1); *see also Bush Explains Decision to Commute Lucas' Sentence*, HOUS. CHRON., July 14, 1998, at 13A (noting that the governor stated in a speech that "his bottom line [with respect to clemency decisions] is the defendant's guilt or innocence"). Penry argues that the governor's policy deprives Penry of his substantive and procedural due process rights and that the procedures governing the Board's decisionmaking in capital commutation cases are so arbitrary as to deprive Penry of procedural due process.

Respondent does not challenge Penry's factual description of the governor's clemency policy or of the Board's procedures in capital clemency cases. Respondent argues that this court may not reach the merits of Penry's claims because: (1) the claims are not yet ripe for consideration, and (2) Penry's claims are procedurally barred because he failed to present them to the state courts.

A. Ripeness

Respondent argues that Penry's claim is not ripe because he has not yet sought, or been denied, clemency. Penry asserts that he would seek clemency on the basis of his asserted ineligibility for the death penalty. This basis for clemency is unrelated to the issue of Penry's innocence of the crime itself. Assuming, on the basis of this record, that Penry's characterization of the governor's policy is correct, the governor would not consider this

argument for clemency. Respondent argues that Penry's claim is not ripe because Penry may receive clemency when he seeks it and because the Board's procedures may change before he does.

" '[T]he ripeness inquiry focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention.' " *American Forest and Paper Ass'n v. United States EPA*, 137 F.3d 291, 296 (5th Cir. 1998) (quoting *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153-54 (5th Cir. 1993)). "For an issue to be ripe for adjudication, a plaintiff must show that he 'will sustain immediate injury' and 'that such injury would be redressed by the relief requested.' " *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994) (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 98 S. Ct. 2620, 2635 (1978)); *see also Whitmore v. Arkansas*, 110 S. Ct. 1717, 1724-25 (1990) (holding that "[a] threatened injury must be 'certainly impending' " to confer Article III standing to bring a claim (citation omitted)).

The ripeness issue is whether Penry's threatened injury is "immediate" or "certainly impending," making it sufficient to justify judicial intervention at this time. Although a defendant need not have exhausted his appeals in order to apply for a commutation of his death sentence, the Board may not render a decision on the merits of an application without an "execution date." 37 TEX. ADMIN. CODE § 143.57(2). This language implies that the Board will not decide a commutation application if the defendant's execution has been stayed. *See State ex rel. Holmes v. Honorable Court of Appeals for Third Dist.*, 885 S.W.2d 389, 391 (Tex. Crim. App. 1994) (noting that the

Board did not act on a defendant's application for clemency because the Court of Criminal Appeals had stayed the defendant's execution); *see also* 37 TEX. ADMIN. CODE § 143.43(f)(3) (requiring the Board to abstain from deciding an application for a reprieve in a capital case if the defendant's execution has been stayed). Because Penry's execution date has been set and his execution stayed, Penry likely will not be able to obtain a decision from the Board until his habeas proceedings are concluded and his stay of execution is lifted. In that case, Penry could present ripe claims to this court only by filing a successive petition raising the claims. Given the strict limitations on this court's ability to reach the merits of a claim presented in a successive petition, this court is unwilling to find Penry's claims unripe on this ground.

In addition, although the governor's policy could change before Penry submits his clemency application, Penry cannot wait for the outcome of the clemency decision before seeking relief. Penry will have no adequate remedy if he is denied clemency because his execution would likely occur immediately after the denial.

With respect to the Board's procedures, respondent has presented no evidence that the Board's procedures are likely to change before a decision is rendered on Penry's application. Penry cannot afford to wait until he is actually deprived of his protected interest to challenge the Board's procedures. This court finds that Penry's claims are ripe.

B. Exhaustion

Penry did not present the claims to the state courts on direct appeal or in his state habeas application. Penry's claims are therefore unexhausted under TEX. CODE CRIM. PROC. § 11.071. *See Nobles*, 127 F.3d at 423. Penry argues that he could not have presented the claims to the state courts because the State of Texas had not yet set his execution; Penry argues that he therefore had no "immediate need" to seek clemency relief. This court assumes Penry asserts that he meets the exception in article 11.071 § 5(a)(1), for claims in which the "factual or legal basis for the claim was unavailable" on the date the initial application was filed.

The Board procedures require only that a defendant file his application for clemency after his "conviction"; there is no requirement that a defendant be under an execution date before filing. Penry presents no evidence that the Board procedures were different when he filed his state habeas application. The factual and legal bases for Penry's challenge to the Board's procedures were not unavailable on the date he filed his application. Penry has procedurally defaulted this claim.

However, Penry's evidence of the governor's policy is from December 19, 1997, after the date Penry filed his initial state application. Penry's claim regarding the governor's policy meets the exception in section 5(a)(1). This court will nonetheless address both of Penry's claims on the merits.

C. The Merits

Penry argues that the governor's policy deprives him of his substantive due process rights. The Due Process Clause "provides heightened protection against governmental interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997). The Supreme Court has recently made it clear that capital defendants do not have a liberty interest in executive clemency. In *Ohio Adult Parole Authority v. Woodard*, 118 S. Ct. 1244 (1998), the Court rejected the defendant's argument that Ohio's clemency procedure violated his due process rights. In an opinion written by Chief Justice Rehnquist, a four-member plurality of the Court stated:

> The process [the defendant] seeks would be inconsistent with the heart of executive clemency, which is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations. . . . We agree that [the defendant] maintains a residual life interest, e.g., in not being summarily executed by prison guards. However, . . . [the defendant] cannot use his interest in not being executed in accord with his sentence to challenge the clemency determination by requiring the procedural protections he seeks.

Id. at 1250. The Chief Justice's opinion later stated: "There is thus no substantive expectation of clemency." *Id.* at 1251. In his opinion concurring and dissenting in the holding, Justice Stevens explicitly agreed that a state is

not constitutionally required to provide a clemency procedure, *id.* at 1255 (Stevens, J., concurring in part and dissenting in part), and in a four-member concurring opinion, Justice O'Connor implicitly agreed with this proposition. *Id.* at 1254 (O'Connor, J., concurring). This court rejects Penry's claim that the governor's clemency policy deprives him of his substantive due process rights.

In *Woodard*, five members of the Court agreed that a state that chose to implement a clemency procedure was required to provide some procedural safeguards. Justice O' Connor stated: "I believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings." *Id.* (O'Connor, J., concurring) (emphasis in original). Justice Stevens stated: "[I]f a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause." *Id.* at 1255 (Stevens, J., concurring in part and dissenting in part).

Woodard, however, does not support Penry's argument that the governor's determination to limit clemency consideration to claims of factual innocence or lack of fair access to the courts fails to provide minimal procedural guarantees. Justice O'Connor stated that "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 1254 (O'Connor, J., concurring). Similarly, Justice Stevens stated that "no one would contend that a governor could ignore the commands of the Equal

Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency." *Id.* at 1255 (Stevens, J., concurring in part and dissenting in part). Justices Stevens and O'Connor make clear that "*minimal* procedural guarantees" require only that clemency decisions not be arbitrary.

The governor's decision to limit clemency to claims of factual innocence and unfair process is not so arbitrary or unfair as to violate the "minimal" guarantees required. In *Herrera v. Collins*, 113 S. Ct. 853, 868 (1993), the Supreme Court specifically noted that clemency has historically provided a "fail safe" precaution against the execution of innocent persons. The Court stated: "History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Id.* at 869. While nothing in *Herrera* limits clemency to addressing claims of factual innocence, *Herrera* makes it clear that it is reasonable, rather than arbitrary, for a state to use its clemency procedure as a device to prevent the execution of the innocent. This court DENIES Penry's claim that the governor's policy violates his procedural due process rights.

Penry's claim that the Board's procedures deny him procedural due process is also unpersuasive. The Board is not required to employ objective criteria to make its clemency recommendations in capital cases. *Woodard* requires that clemency decisions not be a product of arbitrary factors. Penry presents no evidence that the Board members exercise their discretion in a discriminatory or arbitrary manner. To the contrary, the record

shows that the Board considers claims of factual innocence. The Board recently voted 17-1 to recommend a reprieve for a death row defendant because of doubts about his guilt. *See* Kathy Walt *et al., Parole Board Recommends Lucas be Spared*, HOUS. CHRON., June 26, 1998, at A1. Penry asserts that no Board member voted to commute a death sentence in 1997 and that, in some cases, not all Board members voted. Even if these assertions are true, they do not evidence such arbitrariness in the Board members' decisionmaking as to warrant habeas relief.

This court DENIES Penry's claim that the State of Texas's clemency procedures deny him procedural due process.

XVIII. Certificate of Appealability

Penry has not requested a Certificate of Appealability ("COA"), but this court may determine whether he is entitled to one. *See Hughes v. Johnson*, 991 F. Supp. 621, 639 (S. D. Tex. 1998). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1998); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right."[30]

28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). "A petitioner can meet this burden by demonstrating that 'the issues [presented] are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.' " *Little v. Johnson*, 162 F.3d 855, 859 (5th Cir. 1998) (alteration in original) (quoting *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394-95 & n.4 (1983)). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.' " *Id.* (quoting *Barefoot*, 103 S. Ct. at 3394-95).

This court has carefully and exhaustively considered each of Penry's claims. While the issues Penry raises are clearly important and deserving of the closest scrutiny, this court finds that each of his claims is foreclosed by clear, binding precedent, often recently decided. This

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[30] In Section 102 of the AEDPA, Congress amended 28 U.S.C. § 2253 to provide that a COA, rather than a certificate of probable cause ("CPC"), is the appropriate mechanism for allowing a habeas petitioner to appeal a final judgment from a federal district court. "The standard for obtaining a COA is the same as for a CPC." *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997); *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997). However, "a COA, unlike a CPC, must 'indicate which specific issue or issues satisfy the showing required. . . . ' " *Murphy*, 110 F.3d at 11 n.l (quoting 28 U.S.C. § 2253(c)(3)).

court concludes that under these precedents, Penry has failed to make a "substantial showing of the denial of a constitutional right." This court concludes that Penry is not entitled to a certificate of appealability.

XIX. Conclusion

Penry has presented a substantial majority of his claims to the Texas state courts in post-conviction proceedings. To the extent certain claims were not previously presented to the Texas courts, they are unexhausted and are denied as an abuse of the writ. *See Nobles*, 127 F.3d at 420.

As to those claims which were presented to the Texas Court of Criminal Appeals, either on direct appeal or during the state habeas proceedings, Penry can obtain federal habeas relief only upon a showing that the state court's adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Penry has failed to satisfy this burden.

This court GRANTS respondent's motion for summary judgment; DENIES Penry's motion to strike respondent's motion for summary judgment; and DENIES Penry's cross-motion for summary judgment. This court lifts the stay of execution, denies Penry's petition for a writ of habeas corpus (Docket Entry No. 18), and denies Penry a certificate of appealability. An appropriate final order dismissing this case will issue separately.

SIGNED on March 29, 1999 at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHNNY PAUL PENRY,	§	
	§	
Petitioner,	§	CIVIL ACTION
	§	NO. H-97-4094
VS.	§	
	§	
GARY L. JOHNSON,	§	
Director, Texas Department of	§	
Criminal Justice, Institutional	§	
Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND OPINION

In a March 29, 1999 Memorandum and Order, this court analyzed the petition for writ of habeas corpus filed by petitioner, Johnny Paul Penry, and granted summary judgment in favor of respondent, Gary L. Johnson, Director of the Texas Department of Criminal Justice – Institutional Division, on each of Penry's claims. (Docket Entry No. 33). Following a detailed review of Penry's arguments, this court determined that Penry was not entitled to a Certificate of Appealability ("COA").

Penry has filed a motion to alter and amend the judgment and a brief in support. (Docket Entry Nos. 36, 37). Based on the motion, the brief, this court's March 29, 1999 Memorandum and Order, and the applicable law, this court DENIES Penry's motion to alter and amend the judgment. The reasons are stated below.

I. The Motion to Alter and Amend the Judgment

Penry raises two grounds: (1) this court applied an impermissibly restrictive standard in denying Penry a COA; and (2) this court erred in its legal analysis of Penry's "mitigation instruction" claim.

A. The Legal Standard for Granting a COA

The law is clear that a COA issues if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see* also *United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). "A petitioner can meet this burden by demonstrating that 'the issues [presented] are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.' " *Little v. Johnson*, 162 F.3d 855, 859 (5th Cir. 1998) (alteration in original) (quoting *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394-95 & n.4 (1983)), *cert. denied*, 119 S. Ct. 1768 (1999). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.' " *Id.* (quoting *Barefoot*, 103 S. Ct. at 3394-95).

Penry's disagreement is not with this court's statement of the legal standard for granting a COA, but rather the application of that standard. In its prior Memorandum and Order, this court found that "Penry has failed to make a 'substantial showing of the denial of a constitutional right' " "because . . . each of his claims is foreclosed by clear, binding precedent, often recently decided."

(Docket Entry No. 33, p. 156). Penry asserts that the merits of some of his claims are "debatable among jurists of reason" because support for these claims has come from "Judges and Justices from the Supreme Court, Fifth Circuit, and the Texas Court of Criminal Appeals," although the support is found only in concurring and dissenting opinions. (Docket Entry No. 37, p. 4).[1] Penry argues that "[t]o deny [him] a certificate of appealability is implicitly to call into question the *reasonableness* of some of the country's greatest legal minds." (*Id.*).

Penry's approach to the legal standard for the issuance of COAs overstates the basis, and understates the purpose, of a COA. Courts deny COAs on issues that have sparked vigorous disagreement among judges, but have been decided, even without consensus among all "jurists of reason."

In *Little v. Johnson*, the petitioner requested a Certificate of Probable Cause ("CPC")[2] on a due process claim

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[1] Penry identifies the following jurists as those supporting his "most important claims": *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J.; Souter, J.; Ginsburg, J.; Breyer, J.) (respecting the denial of the petition for writ of certiorari); *Whitaker v. State*, 977 S.W.2d 595, 601-02 (Tex. Crim. App. 1998) (Price, J., concurring), *cert. denied*, 119 S. Ct. 878 (1999); *May v. Collins*, 904 F.2d 228, 232-33 (5th Cir. 1990) (Reaveley, J. and King, J., concurring). (Docket Entry No. 37, p. 4).

[2] In Section 102 of the AEDPA, Congress amended 28 U.S.C. § 2253 to provide that a COA, rather than a CPC, is the appropriate mechanism for allowing a habeas petitioner to appeal a final judgment from a federal district court. "The standard for obtaining a COA is the same as for a CPC." *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997); *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997). However, "a COA, unlike a CPC, must

based on the admission of psychiatric testimony on the potential for future dangerousness in the sentencing phase of his capital trial. The testimony was based on a hypothetical set of facts. *See* 162 F.3d at 862-63. The Fifth Circuit declined to issue the CPC, despite the fact that three Supreme Court justices – Justices Blackmun, Brennan, and Marshall – had previously found that such psychiatric testimony was constitutionally defective. *See Barefoot*, 103 S. Ct. at 3406-18 (Blackmun, J., dissenting).

In *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. June 17, 1999) (No. 98-9936), the petitioner requested a COA on his claim that his state habeas proceedings violated his due process rights. The Fifth Circuit did not grant the petitioner the COA, because "[o]ur circuit precedent makes clear that [petitioner's] 'claim fails because infirmities in state habeas proceedings do not constitute grounds for relief in federal court.' " *Id.* at 180 (quoting *Hallmark v. Johnson*, 118 F.3d 1073, 1080 (5th Cir.), *cert. denied sub nom. Johnson v. Monroe*, 118 S. Ct. 576 (1997)). The Fifth Circuit observed that five of the six circuits that had considered the issue had arrived at the same conclusion. *See id.* The fact that a United States court of appeals had disagreed did not prevent the Fifth Circuit from denying the petitioner a COA.

In *Castillo v. Johnson*, 141 F.3d 218 (5th Cir.), *cert. denied*, 119 S. Ct. 28 (1998), the petitioner claimed that his federal constitutional rights were violated by the state

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"indicate which specific issue or issues satisfy the showing required. . . . "' *Murphy*, 110 F.3d at 11 n.1 (quoting 28 U.S.C. § 2253(c)(3)).

trial court's exclusion of polygraph evidence, a decision based on a state law *per se* bar on such evidence. Citing *United States v. Sheffer*, 118 S. Ct. 1261 (1998), the Fifth Circuit found that a *per se* rule against the admission of polygraph evidence did not violate the Fifth or Sixth Amendment rights of the accused to present a defense. *See id.* at 222. The Fifth Circuit declined to issue the petitioner a CPC, notwithstanding the fact that Justice Stevens dissented from the Supreme Court's opinion approving a *per se* bar on polygraph evidence. *See Sheffer*, 118 S. Ct. at 1270-79 (Stevens, J., dissenting).

In *Barber v. Johnson*, 145 F.3d 234 (5th Cir.), *cert. denied*, 119 S. Ct. 518 (1998), the petitioner had been convicted of capital murder and sentenced to death. The petitioner petitioned for state habeas relief, asserting error in the admission of certain psychiatric testimony. The Texas Court of Criminal Appeals denied that relief because it found any error to be harmless. *See Barber v. State*, 757 S.W.2d 359 (Tex. Crim. App. 1988). The petitioner unsuccessfully sought habeas relief in federal district court. In his appeal to the Fifth Circuit, the petitioner complained that the Texas Court of Criminal Appeals and the district court mistakenly applied the harmless error standard articulated in *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), rather than the standard set out in *Chapman v. California*, 87 S. Ct. 824 (1967). Noting that a prior panel, *Hogue v. Johnson*, 131 F.3d 466 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1297 (1998), had already decided the issue, the Fifth Circuit denied the petitioner's request for a CPC, even though the "holding in *Hogue* may be viewed as inconsistent with the Supreme Court's underlying reasoning for applying the *Brecht* standard in federal habeas

review." *Barber*, 145 F.3d at 236. The *Barber* court disagreed with the holding of a prior Fifth Circuit panel, yet declined to issue a CPC because the prior panel's decision was binding. *See id.* at 237.

In *Boyd v. Johnson*, 167 F.3d 907 (5th Cir. 1999), *cert. denied*, ___ S. Ct. ___, 1999 WL 412897 (U.S. Aug. 5, 1999), the Fifth Circuit considered the petitioner's request for a CPC on his *Simmons* claim.[3] Penry asserted a similar claim in this case and now argues that it is especially worthy of a COA. The Fifth Circuit denied the request for a CPC in *Boyd*. In *Boyd*, as in this case, petitioner asserted that the trial court erred by permitting the prosecutor to argue future dangerousness while denying petitioners the opportunity to present evidence and argue that if the jury imposed a sentence, parole would not be likely. In *Boyd*, as in this case, petitioner relied on a dissent from the denial of *certiorari* in *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J., dissenting from the denial of the petition for a writ of *certiorari*). Four justices joined in the dissent. In the dissenting opinion, Justice Stevens noted the "obvious tension" between *Simmons* and the refusal by

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[3] In *Simmons v. South Carolina*, 114 S. Ct. 2187, 2190 (1994), the Supreme Court held that when a capital murder defendant would be ineligible for parole under state law if sentenced to life imprisonment, and the prosecution argues that the defendant would be dangerous in the future, due process requires the jury to be informed that the defendant would be ineligible for parole. The Fifth Circuit has rejected the extension of the *Simmons* rule to a Texas capital defendant. *See Allridge v. Scott*, 41 F.3d 213, 222 (5th Cir. 1994). Under Texas law, a capital defendant is not legally ineligible for parole. The Fifth Circuit held that *Simmons* applies only to situations in which the defendant is "legally ineligible" for parole. *Id.* at 222.

the State of Texas to allow a defendant to give the jury truthful information about his parole eligibility, observing that this tension made the Texas capital punishment scheme "especially troubling." *See id.* at 355-56. The *Boyd* court declined to grant a CPC on the *Simmons* claim, despite the dissent by four members of the Supreme Court from the denial of petition for a writ of *certiorari* in *Brown*. *See* 167 F.3d at 912-13.

Penry's argument would appear to require that a COA issue in every appeal from a denial of habeas in a capital case. There have been, and are, individuals and jurists of reason who find capital punishment unconstitutional in any case, as a violation of basic moral standards of decency. Penry echoed this argument in his habeas petition, particularly as applied to the execution of those with the impairments Penry presents. However, it is clear that the disagreement by jurists of reason over the constitutionality of capital punishment does not require a COA in every capital case.

COAs should be granted on an issue presented in the habeas petition that is not settled. *See Drinkard v. Johnson*, 97 F.3d 751, 756 n.6, 770 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled on other grounds by Lindh v. Murphy*, 117 S. Ct. 2059 (1997).[4] However, habeas petitioners cannot obtain a COA by finding support for their

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[4] There is some authority suggesting that a significant circuit split might also warrant the issuance of a COA, even when there is binding authority in the circuit of the court considering the COA request.

In *Lozada v. Deeds*, 111 S. Ct. 860 (1991) (per curiam), a Nevada District Court and the Ninth Circuit denied the petitioner's request for a CPC. *See* 111 S. Ct. at 861. The Supreme Court found that the Ninth Circuit erred in denying the petitioner a CPC, because at least two circuit courts had resolved the habeas claim at issue in a different manner. *See id.*

In *Lynce v. Mathis*, 117 S. Ct. 891 (1997), the petitioner's request for a CPC on his *ex post facto* claim had been denied by a Florida district court based on clear Florida and Eleventh Circuit precedent. *See* 117 S. Ct. at 893. The Eleventh Circuit also denied the petitioner a CPC in an unpublished order. Noting that the Tenth Circuit had "reached a different conclusion on similar facts," the Supreme Court granted certiorari and reversed the Eleventh Circuit. *See id.*

This court does not reach the issue of whether this situation requires the issuance of a COA. None of Penry's claims is supported by a binding majority decision of any circuit court.

claims in concurring or dissenting opinions, in the face of binding majority decisions adverse to their claims.

Penry's claims are foreclosed by clear, binding Fifth Circuit precedent. His claims have not attracted the support of a majority in any other circuit. Penry is not entitled to a COA as to such issues.

B. The Mitigation Instruction Claim

In Penry's federal habeas challenge to his first trial and conviction, the Supreme Court granted relief after finding that none of the three special issues set out in article 37.071(b) of the Texas Code of Criminal Procedure provided a means for the jury to give effect to Penry's mitigating evidence. *See Penry v. Lynaugh*, 109 S. Ct. 2934, 2949 (1989) ("*Penry I*"). During the sentencing phase of Penry's retrial, the jury was again asked to answer the

same special issues.[5] In the retrial, however, the trial judge provided the jury with an instruction on how to incorporate Penry's mitigating evidence into its sentencing decision. In this habeas challenge, Penry claims that this instruction was insufficient to cure the constitutional deficiencies identified by the Supreme Court in *Penry I*.

This court analyzed the jury instruction, Penry's presentation of extensive mitigating evidence, and defense counsel's jury arguments. In *Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 119 S. Ct. 418 (1998), the Fifth Circuit had approved an instruction similar to the

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[5] The special issues that the jury was asked to answer included:

Special Issue No. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(Trans. Vol. 5, pp. 1330-31).

one at issue in Penry's retrial.[6] This court held that in the sentencing phase of Penry's second trial, the jury was able to give "constitutionally sufficient consideration to Penry's mitigating evidence." (Docket Entry No. 33, p. 24).

Penry now asks this court to reconsider its ruling. Penry asserts that jury instruction given in his retrial was defective in that it did not place his mitigating evidence within the effective reach of the jury; that the defects in the jury instruction were not present in the instruction at issue in *Emery*; and that these defects could not be cured

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[6] In *Emery*, the jury was instructed as follows:

> [Y]our answers to the Special Issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal moral culpability of the defendant in this case.
>
> When you deliberate about the questions posed in the Special Issues, you are to consider any mitigating circumstances supported by the evidence presented in both phases of the trial. A mitigating circumstance may be any aspect of the defendant's background, character, and record, or circumstances of the crime, which you believe makes a sentence of death inappropriate in this case. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the special issues. If you determine, in consideration of this evidence, that a life sentence, rather than a death sentence, is an appropriate response to the personal moral culpability of the defendant, you are instructed to answer the Special Issue under consideration "No".

Emery, 139 F.3d at 200.

by arguments of counsel or by the presentation of mitigating evidence.

In Penry's retrial, the trial court gave the following instruction to the jury:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating

> evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

(Trans. Vol. 5, p. 1329).

Penry asserts that this instruction has two flaws not present in the jury instruction given in *Emery*.[7] First, Penry's jury was instructed to give a negative finding to one of the special issues only if the jury determined that a "life sentence . . . , rather than a death sentence, is an appropriate response to the *personal culpability* of the defendant." (*Id.* (emphasis added)). The *Emery* instruction, by contrast, asked the jury to consider the "personal *moral* culpability" of the defendant. Penry asserts that the phrase "personal culpability of the defendant," without the word "*moral*," might lead the jurors to believe that they could "only consider whether Penry is 'personally' culpable, or responsible, for the crime itself – not whether there is anything in the 'defendant's background, character, or other circumstances that reflect a reduced *moral* capability.' " (Docket Entry No. 37, p. 17 (quoting *Boyd v. Johnson*, 167 F.3d 907, 911 (5th Cir. 1999))).

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[7] To the extent that Penry's claim rests on a challenge to the constitutionality of a "nullification instruction," rather than on the differences between his instruction and the one given in *Emery*, this claim is foreclosed by *Emery*. *See Emery*, 139 F.3d at 199-200; *Gribble v. Johnson*, 8 F. Supp. 2d 942, 956-57 (S.D. Tex. 1998); *see also Wheatfall v. State*, 882 S.W.2d 829, 841 (Tex. Crim. App. 1994); *Coble v. State*, 871 S.W.2d 192, 206 (Tex. Crim. App. 1993) (en banc); *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992).

The Supreme Court in *Penry I* approved the use of the term "personal culpability" with reference to mitigating evidence. The Court noted that a jury must be able to consider and give effect to mitigating evidence "because the punishment should be directly related to the *personal culpability* of the defendant." *Penry I*, 109 S. Ct. at 2951 (emphasis added). In addition, in the following passage, the Court used the concepts of personal culpability and moral culpability interchangeably:

> *Personal culpability* is not solely a function of a defendant's capacity to act "deliberately." A rational juror at the penalty phase of the trial could have concluded, in light of Penry's confession, that he deliberately killed Pamela Carpenter to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was *less morally "culpable* than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood.

Penry I, 109 S. Ct. at 2949 (emphasis added) (citing *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O. Connor, J., concurring)). The absence of the word "moral" in Penry's instruction does not make the instruction constitutionally defective.

Penry also challenges the last sentence of the jury charge as constitutionally defective. The judge instructed the jury that: "[i]f you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration,*

rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues." (Trans. Vol. 5, p. 1329) (emphasis added). Penry argues that the phrase, "as reflected by a negative finding to the issue under consideration," a phrase not found in the *Emery* jury charge, "brings the *Penry* violation around full-circle to what it was in *Penry I*. If, according to the court's instruction, a life sentence is only appropriate if there is a 'negative finding to the issue under consideration', then Penry might as well not have had a *Penry* instruction, because the instruction only allows the jury to grant a life sentence if the honest answer to one of the three special questions is 'no.'" (Docket Entry No. 37, pp. 17-18).

The Supreme Court has admonished that courts are "not [to] engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would – with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.' " *Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993) (quoting *Boyde v. California*, 110 S. Ct.1190, 1198 (1990)). The standard for determining whether instructions adequately permit a jury to consider and give effect to mitigating evidence is " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' " *Buchanan v. Angelone*, 118 S. Ct. 757, 761 (1998) (quoting *Boyde*, 110 S. Ct. at 1198). Penry need not prove that "it was more likely than not that the jury was prevented from giving effect to the [mitigating] evidence, [but] the standard

requires more than a mere possibility of such a bar." *Johnson v. Texas*, 113 S. Ct. at 2669.

Before reaching the disputed sentence, the trial court informed the jury that:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that *your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant*, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that *when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case.* If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, *give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue.*

(Trans. Vol. 5, p. 1329) (emphasis added). Examining the charge in its entirety, the last sentence told the jury how

to effectuate a life sentence, if that was the punishment the jury deemed appropriate in light of Penry's mitigating evidence. The charge as a whole removes the confusion resulting from viewing the challenged phrase in isolation.

"Even were [this court] to entertain some doubt as to the clarity of the instructions, [this court held that] the entire context in which the instructions were given expressly informed the jury that it could consider mitigating evidence." *Buchanan*, 118 S. Ct. at 762. This court analyzed Penry's counsel's closing arguments in the sentencing phase of the trial, as well as the presentation of Penry's extensive mitigating evidence in both the guilt and sentencing phases of the trial. Penry now asserts that this court erred in considering these factors.

The Supreme Court has held that constitutionality of jury instructions depends upon "the entire context in which the instructions were given." *Buchanan*, 118 S. Ct. at 762; *see also Boyde*, 110 S. Ct. at 1199-1200. As Penry concedes, (Docket Entry No. 37, p. 11), and as both the Supreme Court and Fifth Circuit have held, jury arguments explaining how mitigating evidence can or should be considered in sentencing are part of this "context" and can affect whether the jury likely applied the instructions so as to present consideration of relevant mitigating evidence. *See Buchanan*, 118 S. Ct. at 762-63; *Drinkard*, 97 F.3d at 761 n.16 ("The arguments of counsel are relevant to a jury's interpretation of challenged jury instructions, but the court's instructions carry substantially more weight."). Penry correctly observes that the arguments of counsel cannot cure an otherwise unconstitutional jury charge. However, as explained above, that situation was

not present here. In this case, the jury received constitutional jury instructions that were further clarified by the arguments of Penry's counsel. This court properly considered these jury arguments in examining the "entire context in which the instructions were given."

Penry also argues that this court erred in stating that Penry's presentation of extensive mitigating evidence would likely convey to the jury that they may take the evidence into account in sentencing. Three times in the last decade, the Supreme Court has held that the defendant's presentation of mitigating evidence is relevant to determining how a jury would understand a given instruction. *See Buchanan*, 118 S. Ct. at 762-63 ("[T]here were two days of testimony relating to petitioner's family background and mental and emotional problems. It is not likely that the jury would disregard this extensive testimony in making its decision, particularly given the instruction to consider 'all the evidence.' "); *Johnson v. Texas*, 113 S. Ct. at 2669 ("It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue."); *Boyde*, 110 S. Ct. at 1199-1200 ("All of the defense evidence presented at the penalty phase – four days of testimony consuming over 400 pages of trial transcript – related to petitioner's background and character, and we think it unlikely that reasonable jurors would believe that the court's instructions transformed all of this favorable testimony into a virtual charade.") (internal quotation omitted).[8]

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[8] The position Penry takes in this case has been presented only in a dissenting opinion. *See Buchanan*, 118 S. Ct. at 766 (Breyer, J., dissenting) ("[T]he presentation of evidence does not tell the jury that the evidence presented can be taken into account – particularly in the context of an instruction that seems to exclude the evidence from the universe of relevant considerations.").

This court recognizes that the presentation of mitigating evidence alone cannot cure a *Penry* error. Under that approach, Penry would not have been entitled to habeas relief in his first habeas challenge. As the *Boyde* Court explained: "[p]resentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence. But the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous." *Boyde*, 110 S. Ct. at 1200.

Penry attempts to distinguish *Buchanan*, *Johnson*, and *Boyde* by pointing to a passage in *Johnson*, in which the Court distinguished *Penry I*. The *Johnson* Court observed that in that case, the petitioner's mitigating evidence was relevant to the second special issue, while in *Penry I*, Penry's mitigating evidence could not be given effect under the special issues. *See* 113 S. Ct. at 2669-70. This distinction applied to Penry's first trial, not his second. During Penry's retrial, the jury instructions brought Penry's mitigating evidence within the effective reach of the jury. The Supreme Court has expressly instructed courts to consider the nature and extent of the mitigating

evidence presented in "deciding how a jury would understand an instruction which is at worst ambiguous." *Boyde*, 110 S. Ct. at 1200.[9]

This court finds that there was not "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" and DENIES Penry's motion to alter and amend the judgment on his mitigation instruction claim.

II. Conclusion

This court DENIES Penry's motion to alter and amend the judgment.

SIGNED on August 12, 1999, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

[9] This court recognizes that the approach is inherently somewhat circular. While courts are to consider the overall context in which jury instructions are given (including the jury arguments and the presentation of mitigating evidence) in deciding whether a jury instruction is constitutional, courts must make a preliminary finding that the challenged instruction is constitutional, or at worst ambiguous, before considering these factors. The only way to avoid this potential circularity is to assume that the overall context can only be considered when jury instructions are ambiguous, not when instructions are facially unconstitutional.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-20868

JOHNNY PAUL PENRY

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges. W. EUGENE DAVIS, Circuit Judge:

Penry filed a motion for a certificate of appealability (COA) in this § 2254 capital habeas proceeding, alleging various constitutional violations. For the reasons that follow, we deny his motion.

I.

Penry was convicted of capital murder and sentenced to death in Texas state court for the rape and murder of Pamela Carpenter. Penry raped Carpenter and stabbed her with a pair of scissors. He had met her several weeks earlier while helping to install appliances in her home.

Penry matched the description Carpenter gave of her attacker before she died. After being given his Miranda warnings, Penry gave an oral confession and later a signed confession to the rape and murder. At trial, Penry offered mitigating evidence that he was mentally retarded and abused as a child. He was convicted and sentenced to death. The United States Supreme Court granted federal habeas relief and vacated his sentence, holding that Penry's rights were violated by jury instructions the trial court gave at the punishment phase of his trial.[1]

The court found that none of the three special statutory questions provided to the jury, under Texas law, allowed the jury to give effect to Penry's mitigating evidence. "The jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence." *Penry I*, 492 U.S. at 320; 109 S.Ct. at 2947.

In the second trial, the trial court followed the Texas statutory scheme and gave the jury the same three special questions it had given the jury in the first trial. However, the judge also provided supplemental instructions directing the jury to consider any other relevant mitigating evidence and explained how to give effect to that evidence. Penry was again convicted of capital murder and sentenced to death. The sentence was again affirmed on direct appeal[2] and state habeas relief was denied. The

[1] *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989) ("*Penry I*").

[2] *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995).

district court also denied Penry's application for a COA. Penry now seeks a COA from this court. We granted Penry's motion for a stay of execution, in order to consider his motion for a COA.

II.

A COA may only issue if the petitioner makes a "substantial showing of the denial of a constitutional right."[3] This burden can be met if the issues presented "are debatable among jurists of reason; . . . a court could resolve the issues in a different manner; or . . . the questions are adequate to deserve encouragement to proceed further."[4]

A death sentence alone does not justify the automatic issuance of a COA, although it is a proper consideration.[5] Any doubts as to whether the COA should issue are to be resolved in the petitioner's favor.[6]

Penry's petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA).

[3] 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 120 S.Ct. 1595, 1603 (2000); *United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998).

[4] *Miller v. Johnson*, 200 F.3d 274, 280 (5th Cir. 2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383, 3394 n.4 (1983)); *Hicks v. Johnson*, 186 F.3d 634, 636 (5th Cir. 1999), cert denied 120 S.Ct. 976 (2000); *see also Slack*, 120 S.Ct. at 1603-4 (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 and n. 4, 103 S.Ct. 3383).

[5] *Lamb v. Johnson*, 179 F.3d 352, 356 (5th Cir. 1999), cert denied 120 S.Ct. 522 (1999).

[6] *Id.*

Thus, for questions of law or mixed questions of law and fact adjudicated on the merits in state court, we may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]."[7] A state court decision is "contrary to" Supreme Court precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) the "state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and arrives at an opposite result. *Williams v. Taylor*, 2000 WL 385369, at *23 (U.S. Apr. 18, 2000). A state court unreasonably applies Supreme Court precedent if: (1) it unreasonably applies the correct legal rule to the facts of a particular case or (2) it "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at *25. In deciding whether a state court's application was unreasonable, this court considers whether the application was "objectively unreasonable." *Id.* at *26. We now turn to Penry's specific arguments on appeal.

III.

Penry first argues that the jury instructions given during the punishment phase of his trial did not allow the jury to consider and give effect to mitigating evidence

[7] *See Miller*, 200 F.3d at 280-81.

regarding his alleged mental retardation and severe child abuse; thus, the instructions violated the Supreme Court's directive in *Penry v. Lynaugh*,[8] ("*Penry I*"). Penry explains that jurors could only give effect to his mitigating evidence, as the Supreme Court required in *Penry I*, and grant him a life sentence if they found that the evidence fit under one of the three special questions required by Texas law.[9] In *Penry I*, Penry's federal habeas challenge to his first trial and conviction, the Supreme Court found that, under the trial court's instruction, none of the three special statutory questions allowed the jury to give effect to Penry's mitigating evidence. At Penry's retrial, however, the trial court supplemented the instruction it gave in *Penry I*. The court instructed the jury to consider any mitigating circumstances supported by the evidence. The instruction stated, in part:

> [W]hen you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence . . . . A mitigating circumstance may include, but is not limited to, any aspect of the

[8] 492 U.S. 302, 109 S.Ct. 2934 (1989).

[9] The three questions were: 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result? 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? 3. Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased? Since *Penry*, the statute has been revised to add a fourth question concerning mitigation.

defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find . . . any mitigating circumstances . . . you must decide how much weight they deserve, if any, and . . . give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

Penry correctly contends that the instruction still required the jury to give a negative answer to one of the three special issues in order for Penry to receive a life sentence. Penry argues that because childhood abuse and mental retardation do not necessarily fit within the scope of any of the special issues, this instruction did not allow the jury to give effect to these mitigating circumstances. However, on direct appeal, the Texas Court of Criminal Appeals found that the instruction satisfied the requirements of *Penry I*, and allowed the jury to give effect to those mitigating circumstances.[10]

We agree with the district court that the Texas Court of Criminal Appeals' holding that the challenged instruction was constitutional was not an unreasonable application of clearly established law, namely *Penry I*. The

[10] *Penry v. State*, 903 S.W.2d 715, 765 (Tex. Crim. App. 1995).

instruction directed the jury to consider and give effect to any mitigating circumstances supported by the evidence by answering "no" to one of the special issues if they felt a life sentence was appropriate. This instruction satisfied the deficiency in the trial court's instruction identified in *Penry I*: "[t]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence."[11]

We are not writing on a clean slate on this issue. This court approved identical jury instructions on this point in *Miller*[12] and *Emery v. Johnson*.[13] In *Miller*, we concluded that the defendant failed to show that the same instructions given by the trial court in this case violated *Penry I*. We rejected the argument that the jury was prevented from considering the mitigating evidence.[14] "Miller's jury, unlike Penry's, was instructed that it should consider mitigating evidence when deliberating on the special issues. . . . [It] was instructed that if it determined when giving effect to the mitigating evidence, if any, that a life sentence rather than a death sentence was an appropriate response to Miller's personal culpability, a negative finding should be given to the special issue under consideration."[15]

[11] *Penry*, 492 U.S. at 320, 109 S.Ct. at 2947.

[12] 200 F.3d 274.

[13] 139 F.3d 191 (5th Cir. 1997), cert denied 119 S.Ct. 418 (1998).

[14] 200 F.3d at 290.

[15] *Miller*, 200 F.3d at 290.

In the alternative, Penry argues that the jury charge was a "nullification instruction" and was therefore unconstitutional insofar as it instructed jurors to violate their oaths by rendering an untruthful answer to one of the special issues if they wished to give effect to the mitigating evidence presented in this case. We disagree. The jury was not told to disregard the law; rather, it was instructed on how to obey the law, as explained by the Supreme Court in *Penry I*.

IV.

Next, Penry argues that the admission of certain psychiatric testimony and evidence offered by the state at trial violated his Fifth and Sixth Amendment rights.

A.

Penry' s Fifth Amendment challenge involves three categories of psychiatric testimony and evidence presented by the state:1. the testimony of Dr. Fason admitted during the guilt/innocence phase of trial; 2. the testimony of Dr. Quijano admitted during the punishment phase of trial; and 3. the report of Dr. Peebles describing a court-ordered examination of Penry, which was admitted at the punishment phase of trial.

1.

Penry's primary challenge is to the testimony of Dr. Fason. Penry contends that Fason's testimony was based on his court-ordered competency examination of Penry, and that the state's use of the testimony to argue future

dangerousness during the punishment phase violated Penry's rights under *Estelle v. Smith*.[16] More particularly, Penry argues that his Fifth Amendment privilege against compelled self-incrimination was violated because he was not advised before Dr. Fason's examination of his right to remain silent and that his statements could be used against him at the sentencing proceeding.

On direct appeal, the Texas Court of Criminal Appeals found that Dr. Fason's testimony fell within the *Buchanan v. Kentucky*[17] exception to *Estelle*. Under *Buchanan*, if a defendant presents psychiatric evidence, then the prosecution may present rebuttal psychiatric evidence without violating the Fifth Amendment.

Penry contends that, as applied to this case, proper rebuttal evidence under *Buchanan* is limited to evidence tending to prove that Penry is not mentally retarded, and that the state's evidence went beyond that scope. After a careful review of the record, we find that Fason's testimony did fall within the *Buchanan* exception.

At the guilt/innocence phase of trial, Penry offered various psychological records, including reports of his performance on a number of psychological and IQ tests. The records also included observations of his emotional

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[16] 451 U.S. 454, 101 S.Ct. 1866 (1981). *Estelle* held that the defendant's Fifth Amendment right against compelled self-incrimination was violated because he was not told that any statements made during his competency exam could be used against him at the punishment phase on the issue of future dangerousness.

[17] 483 U.S. 402, 107 S.Ct. 2906 (1987).

status and social behavior. As demonstrated by the closing argument of Penry's attorney, one reason these records were introduced was to lay a predicate for an argument that Penry's confessions were not truly voluntary because Penry is mentally retarded and thus submissive to authority figures. The evidence was also offered to support Penry's argument that his mental retardation made him less likely to act with the intent required for capital murder.

Dr. Fason's testimony was introduced to rebut these arguments. Fason testified that Penry had an antisocial personality disorder. He explained how that condition could affect Penry's IQ scores, and that it was possible that Penry was not mentally retarded. Also, he testified that someone with an antisocial personality disorder would usually not be easily led by others and would likely disrespect and rebel against authority. Fason did not discuss any statements made by Penry during Fason's examination, except whether Penry was able to identify his attorney at the interview. We disagree with Penry's characterization of Fason's testimony as a "sham rebuttal" by the state in order to introduce to the jury the idea that Penry was a "psychopath." Penry's defense centered around his diminished capacity – his alleged mental retardation at the time of the offense – and the idea that his mental status rendered his confessions involuntary. Therefore, we conclude that the Court of Criminal Appeals' determination that Fason's testimony was proper rebuttal under *Buchanan* is neither contrary to nor

an unreasonable application of clearly established federal law.[18]

2.

In addition to his challenge to Dr. Fason's guilt phase testimony, Penry also challenges the court's admission, at the punishment phase, of the testimony of Dr. Quijano and the report of Dr. Peebles as violating *Estelle*.

At the punishment phase, Penry called various relatives and neighbors who testified that they believed Penry was mentally retarded and abused as a child. He also called Dr. Randall Price, who had reviewed certain portions of Penry's medical records, and had also administered various psychological tests to Penry. Dr. Price concluded that Penry had a brain impairment and was mentally retarded, and that the mental retardation could have influenced his involvement in criminal activity. Although he admitted that Penry had an antisocial history, he stated that Penry "looks more like people with brain damage . . . than those with antisocial personality."

In rebuttal, the state called Doctors Quijano and Samenow and introduced into evidence a number of Penry's mental health records. Dr. Quijano conducted a court-ordered competency examination of Penry. He testified that Penry had an antisocial personality disorder

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[18] *See Vardas v. Estelle*, 715 F.2d 206, 209-10 (5th Cir. 1983) (finding no violation of defendant's Fifth Amendment privilege because state psychiatrists' testimony was proper as rebuttal to defendant's insanity defense; psychiatrists testified that defendant was not insane, but instead was a sociopath.).

which made him more likely to be violent in the future. However, he testified that he based his opinion only on Penry's medical records including evaluations by others, and not on his own examination of Penry. Thus, the Texas Court of Criminal Appeals found no Fifth Amendment violation. This finding was not contrary to nor an unreasonable application of clearly established federal law.[19]

The report of Dr. Peebles was admitted into evidence during the punishment phase, and was based on Dr. Peebles, 1977 examination of Penry prior to his trial on an unrelated rape charge. The report determined that Penry would be dangerous in the future if released. At the time of Dr. Peebles' examination, Penry was not yet in custody on the instant capital charge, and thus could not have been warned about the potential use of his statements at the punishment phase of the capital trial. The Texas Court of Criminal Appeals found no Fifth Amendment violation because Penry's attorney had requested the examination;

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[19] *See Williams v. Lynaugh*, 809 F.2d 1063, 1068 (5th Cir. 1987) (finding no factual basis for Fifth Amendment violation where state psychologist's testimony on future dangerousness was not based on his interview with the defendant.) *See also Hughes v. Johnson*, 191 F.3d 607, 616-17 (5th Cir. 1999) (finding reasonable a state court's conclusion that psychiatrist's testimony did not violate *Estelle*, despite his having conducted a prior improper interview, because it did not influence his testimony; also rejecting idea that "taint" of prior improper interview created absolute bar to any expression of opinion by that psychiatrist); *cf. Flores v. Johnson*, 2000 WL 426212, at *1, * 7 – *13 (5th Cir. April 20, 2000) (Emilio M. Garza, J., specially concurring) (following but questioning Supreme Court authority allowing psychiatric testimony on future dangerousness deduced without examining the defendant).

thus, Dr. Peebles was acting as an agent of the defense, not of the state, in conducting his examination.[20] We cannot say that the court's conclusion was unreasonable or contrary to Supreme Court precedent.[21]

B.

Penry also argues that his Sixth Amendment right to effective assistance of counsel was violated by the use of testimony on future dangerousness from Doctors Quijano and Fason because Penry and his counsel were told that their examinations of him were solely for the purpose of determining competency. Under *Powell v. Texas*, "once a capital defendant is formally charged, the Sixth Amendment right to counsel precludes such an examination

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[20] *Penry*, 903 S.W.2d. at 759-60; *see Nelson v. State*, 848 S.W.2d 126, 135 (Tex. Crim. App. 1992); *Estelle*, 451 U.S. at 467-68, 101 S.Ct. at 1875-76 (noting that the defendant there did not initiate the examination and was not faced with a person acting solely in his interest).

[21] *See Buchanan v. Kentucky*, 483 U.S. 402, 422-23, 107 S.Ct. 2906, 2917-18 (1987) (finding that "if a defendant requests [the psychiatric] evaluation *or* presents psychiatric evidence . . . the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."). (Emphasis added); *see also Schneider v. Lynaugh*, 835 F.2d 570, 577 (5th Cir. 1988) (finding that, under *Buchanan*, the fact that defendant requested the competency examination militated against the defendant's assertion of the Fifth Amendment privilege, particularly when defendant had also introduced psychological evidence.).

without first notifying counsel that 'the psychiatric examination [will] encompass the issue of their client's future dangerousness.' "[22] The Texas Court of Criminal Appeals concluded that Penry's attorney was "on notice that if he intended to put on a 'mental status' defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal."[23] At a pretrial hearing, the trial court expressly warned Penry's counsel that the testimony of Doctors Fason and Quijano might be admissible at trial if the defense put on psychiatric evidence.[24] At trial, Penry argued that he was mentally retarded; thus his confessions were involuntary. He also argued that mental retardation could have been a contributing cause of Penry's violent criminal acts and that his mental retardation mitigated against the imposition of the death penalty. The state was entitled to rebut this evidence by offering psychiatric evidence that some condition other than mental retardation was a more sound explanation for Penry's conduct. Thus, the Court of Criminal Appeals' findings are not contrary to, nor an unreasonable application of, clearly established federal law.

V.

Penry next contends that his execution would violate the Eighth Amendment, based on his alleged mental retardation and severe child abuse. First, Penry makes a

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[22] 492 U.S. 680, 681, 109 S.Ct. 3146, 3148 (1989) (*quoting Estelle*, 451 U.S. at 471, 101 S.Ct. at 1877).

[23] *Penry*, 903 S.W.2d at 758.

[24] *Id.* at 759, n. 46.

general argument that execution of the mentally retarded is a per se violation of the Eighth Amendment. We agree with the district court that this claim is procedurally barred because Penry did not make the argument in state court. However, even if this claim was not procedurally barred, it has been rejected by the Supreme Court.[25]

Penry also argues that the death penalty would be cruel and unusual as applied to him personally, because of his mental retardation and severe childhood abuse. This argument also fails. On Penry's direct appeal, the Texas Court of Criminal Appeals (*citing Penry I*) concluded that constitutional requirements were met because the jury was able to consider and give effect to Penry's mitigating evidence before determining that the death sentence was appropriate.[26] In Penry's second trial, he presented extensive mitigating evidence and the jury was instructed to consider that evidence and told how to give it effect. More significantly, although Penry was the individual before the Supreme Court in *Penry I*, the Court did not suggest that his execution would be unconstitutional based on his mental retardation or childhood abuse. The Texas Court of Criminal Appeals' conclusion that Penry's execution would not violate the Eighth Amendment was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent.

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[25] *See Andrew v. Collins*, 21 F.3d 612, 632 (5th Cir.1994). cert. denied 513 U.S. 1114, 115 S. t.908 (1995)(*citing Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989)).

[26] *Penry*, 903 S.W.2d at 766-67.

VI.

Penry makes several other arguments in support of his motion. He contends that: 1. the trial court violated his rights under *Simmons v. South Carolina*[27] by excluding his signed statement waiving any right to parole, while allowing the state to argue future dangerousness; 2. his confessions were taken involuntarily in violation of the Fifth Amendment; and 3. the jury instructions at his competency trial were unconstitutionally vague because they did not define the terms "reasonable," "rational," and "understanding." We find all of these arguments to be unpersuasive, essentially for the reasons given by the district court in its thorough opinion of March 29, 1999.

VII.

For the reasons stated above, we deny Penry's motion for a certificate of appealability. We also vacate the stay of execution previously entered by this court.

Dennis, J., dissenting:

In *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*"Penry I"*), the Supreme Court held that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* at 319. Accordingly, the jury must be "instructed that it

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[27] 512 U.S. 154, 114 S.Ct. 2187 (1994).

could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence." *Id.* at 320. The Court agreed with Penry "that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." *Id.* at 322.

Moreover, in *Penry I*, the Court stated that in the absence of a special jury instruction "defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability . . . a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.' " *Id.* at 323. Likewise, the Court observed, the mitigating evidence concerning Penry's mental retardation, which indicated his inability to learn from his mistakes, was relevant to the second issue only as an aggravating factor because it suggests a "yes" answer to the question of future dangerousness. *Id.* at 323. Consequently, the Court concluded, the second special issue "did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse." *Id.* at 324. With respect to the third special issue, the Court stated, a juror who found that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult would not necessarily conclude that

Penry's conduct was reasonable in response to the provocation, if any, by the deceased. "Thus", the Court reasoned, "a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded that Penry's action was not a reasonable response to provocation." *Id.* at 324-25.

In light of the prosecutor's argument to the jurors that, under their oath to follow the law, they must follow the instructions they were given in answering the special issues, the Court concluded that, "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326.

In *Penry I*, the State of Texas conceded at oral argument before the Supreme Court that if a juror concluded that Penry acted deliberately and was likely to be dangerous in the future, but also concluded that because of his mental retardation he was not sufficiently culpable to deserve the death penalty, that juror would be unable to give effect to that mitigating evidence under the instructions given in the case. *See id.* at 326. Finally, the Court held that "[i]n this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 328.

Justice Scalia, in his concurring and dissenting opinion in *Penry I*, criticized the majority's holding as follows:

> In providing for juries to consider all mitigating circumstances insofar as they bear upon (1) deliberateness, (2) future dangerousness, and (3) provocation, it seems to me Texas had adopted a rational scheme that meets the two concerns of our Eighth Amendment jurisprudence. The Court today demands that it be replaced, however, with a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he "lacked the moral culpability to be sentenced to death," *ante*, at 2950, "did not deserve to be sentenced to death," *ante*, at 2951, or "was not sufficiently culpable to deserve the death penalty," *ibid.* The Court seeks to dignify this by calling it a process that calls for a "reasoned moral response," *ante*, at 2949, 2951 – but reason has nothing to do with it, the Court having eliminated the structure that required reason. It is an unguided, emotional "moral response" that the Court demands be allowed – an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy.

Id. at 359-60 (Scalia, J., concurring in part and dissenting in part).

The sentencing scheme and instructions adopted by Texas in Penry's second trial, the subject of the present case, do not satisfy the constitutional requirements described in *Penry I*. The jury was not clearly and directly instructed that it could consider and give effect to the

mitigating evidence of Penry's mental retardation, organic brain damage and abused background as a whole and beyond the scope of the special issues by declining to impose the death penalty. Texas did not replace its sentencing scheme with one which puts "before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he 'lacked the moral culpability to be sentenced to death[.]' " *Id.* at 360 (Scalia, J., concurring in part and dissenting in part). Instead, in the present case, the jury was instructed: "If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues." These instructions require the jury to consider and use only mitigating evidence relevant to the special issues, and permit the jury to decline to impose the death penalty only if that relevant mitigating evidence would cause the jury to change a "yes" answer to a "no." Therefore, the sentencing scheme used in Penry's second trial is subject to the same flaws pointed out by *Penry I*. It does not permit the jury to give effect to the mitigating evidence of retardation and abuse as a whole and beyond the scope of the special issues by declining to impose the

death penalty despite its findings of "yes" to the three special issues questions. The jury's consideration of the mitigating evidence of mental retardation, organic brain damage and extensive child abuse is still shackled and confined within the scope of the three special issues. Therefore, the trial court failed to comply with the dictates of the Supreme Court and again deprived the jury of the ability to give full and complete effect to Penry's mitigating evidence of mental retardation, brain damage and child abuse.

The Supreme Court in *Penry I* held that the jury was not adequately instructed to take into consideration all of Penry's mitigating evidence and that the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to all of his mitigating evidence in answering them. When the Court reversed and remanded for these reasons, the district court and this court became bound by the mandate rule. The mandate rule is not, strictly speaking, merely a matter of law of the case. *See United States v. Wells*, 519 U.S. 482, 488 n.4 (1997). On remand, the district court and the court of appeals owe obedience to the mandate of the Supreme Court and must carry it into effect. *See Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (once case is remanded, circuit court is bound by decree); Moore's Federal Practice 3d § 134.23[1][a].

Subsequently, the Supreme Court distinguished its holding from *Penry I* in cases involving other types of mitigating evidence. *See Johnson v. Texas*, 509 U.S. 350, 369 (1993) ("The evidence of petitioner's youth, however, falls outside Penry's ambit. Unlike Penry's mental retardation, which rendered him unable to learn from his

mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue."); *Graham v. Collins*, 506 U.S. 461, 475-76 (1993) ("The jury was not forbidden to accept the suggestion of Graham's lawyers that his brief spasm of criminal activity in May 1981 was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated. Even if Graham's evidence, like Penry's, had significance beyond the scope of the first special issue, it is apparent that Graham's evidence – unlike Penry's – had mitigating relevance to the second special issue concerning his likely future dangerousness. Whereas Penry's evidence compelled an affirmative answer to that inquiry, despite its mitigating significance, Graham's evidence quite readily could have supported a negative answer."). Accordingly, we are still bound by the mandate and the holding of *Penry I* and must carry them into effect now in the present case.

Moreover, there is no circuit precedent which prevents this panel from owing obedience to the mandate and holding of *Penry I*. In our prior decisions, *Penry I* was not applicable because the proffered evidence either was not constitutionally mitigating evidence[28] or was not beyond the scope of the special issues or beyond the

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[28] *See Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994) (citing *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc)).

effective reach of the jurors,[29] or because the claim was procedurally barred.[30]

In *Graham* v. *Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc), this court explained that *Penry I* presented a "wholly different type of mitigating evidence. Not evidence of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition, but of a permanent one; but nonetheless evidence which was strongly mitigating because these characteristics were due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue." *Id.* at 1029. This court in *Graham* observed that "*Penry* can fairly be read as precluding use of the Texas statutory scheme in any such situation. But, *Penry* can also fairly be read as addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of any of the [special] issues." *Id.* at 1027. Consequently, the use of the Texas statutory scheme was precluded in Penry's situation and this panel has a duty to carry into effect the mandate and holding of *Penry I*. For these reasons, I would grant Penry's application for a COA.

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[29] *See Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc); *Miller v. Johnson*, 200 F.3d 274, 289-90 (5th Cir. 2000).

[30] *See Emery v. Johnson*, 139 F.3d 191, 199-200 (5th Cir. 1997).

I would also grant a certificate of appealability to consider the alleged violations of Penry's 5th and 6th Amendment rights. I share the concerns articulated by Judge Emilio M. Garza's special concurrence in *Flores v. Johnson*, 210 F.3d 456, 458-70 (5th Cir. 2000) (Judge Emilio M. Garza, specially concurring) and believe that Penry has made a substantial showing that the cumulative effect and reinforcement of the prohibited use of the Texas statutory scheme by the erroneous admission of the psychiatric testimony further violated his constitutional rights.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-20868

JOHNNY PAUL PENRY

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

On Petition for Rehearing

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges. W. EUGENE DAVIS, Circuit Judge:

In his petition for rehearing, Penry contends for the first time that *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981), controls the admissibility of the Peebles report. *Battie* was decided before *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906 (1987), and we explained in *Schneider v. Lynaugh*, 835 F.2d 570 (5th Cir. 1988), how *Buchanan* controls this issue when an accused requests an examination, particularly when he puts his mental status at issue. In *Schneider*, we stated that:

> Schneider requested the competency examination. Before *Buchanan*, we held that this fact

> "[did] not obviate the necessity for giving the Miranda warnings" when the examination extended beyond the subject of competency. [*Battie*, 655 F.2d at 702-3]. The Court in *Buchanan*, however, regarded such a request as militating against the defendant's assertion of the privilege, for it stated that "if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested."

835 F.2d at 577.

Because *Schneider*, rather than *Battie*, controls our decision on this issue, we DENY Penry's petition for panel rehearing.

Judge Dennis would GRANT the motion for panel rehearing.

No judge in regular, active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Supreme Court of the United States

Johnny Paul **PENRY**, petitioner,

v.

Gary L. **JOHNSON**, Director, Texas Department of Criminal Justice, Institutional Division.

No. 00-6677.

Nov. 27, 2000.

Case below, 215 F.3d 504.

Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.